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United States v. Armstrong: Selective Prosecution – A Futile Defense and Its Arduous Standard of Discovery

Marc Michael

NOTES

UNITED STATES V. ARMSTRONG: SELECTIVE PROSECUTION—A FUTILE DEFENSE AND ITS ARDUOUS STANDARD OF DISCOVERY

Marc Michael[+]

The United States Government has broad prosecutorial discretion to enforce the nation's criminal laws, and as a result, courts are reluctant to subject this discretion to judicial review.[1] The decision of whether or not to prosecute in each case, however, is subject to the constraints of the equal protection component of the Fifth Amendment Due Process Clause.[2] The Equal Protection Clause of the Fourteenth Amendment prohibits any state from promulgating or enforcing any law that would "deny to any person within its jurisdiction the equal protection of the laws."[3] Through the Fifth Amendment Due Process Clause, this admonition is applicable to the federal government.[4] Thus, a prosecutor's decision to prosecute a specific defendant must not be based upon arbitrary classifications such as race or religion, in light of the constitutional constraints imposed by the Fifth and Fourteenth Amendments.[5]

[+] J.D. candidate, May 1998, The Catholic University of America, Columbus School of Law.

1. *See* United States v. Armstrong, 116 S. Ct. 1480, 1486 (1996) (noting that the judiciary is reluctant to review the prosecutor's discretion because the discretion is grounded in the prosecutor's constitutionally mandated duties); Wayte v. United States, 470 U.S. 598, 607 (1985) (citing United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982)); *see also infra* notes 38-51 and accompanying text (explaining that the prosecutor's discretion is founded in and defined by the Constitution).

2. *See* U.S. CONST. amend. V; *Armstrong*, 116 S. Ct. at 1490 (stating that the Fifth Amendment Due Process Clause limits prosecutorial discretion). The Fifth Amendment states in pertinent part that: "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend V.

3. U.S. CONST. amend. XIV, § 1.

4. *See Wayte*, 470 U.S. at 608 n.9 (stating that the Fifth Amendment contains an equal protection component applicable to the federal government); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) (asserting as identical the Supreme Court's approach to equal protection claims of the Fifth Amendment and the Fourteenth Amendment); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (stating that the Fifth Amendment Due Process Clause does not exclude the concept of equal protection).

5. Oyler v. Boles, 368 U.S. 448, 456 (1962) (stating that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation [, so long

In instances of perceived abuses of prosecutorial discretion, a defendant may argue that he was selectively prosecuted.[6] A defendant's selective prosecution claim "is not a defense on the merits to the criminal charge itself," but instead is "an independent assertion that the prosecutor has brought charges" against the defendant for an unconstitutional reason such as race.[7] A successful selective prosecution claim might defeat the criminal prosecution.[8]

The Supreme Court has applied an equal protection analysis to a prima facie selective prosecution claim, directing a defendant to demonstrate that the decision to prosecute had a "discriminatory effect *and* that it was motivated by a discriminatory purpose."[9] The Supreme Court has

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as,] the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification").

6. *See Armstrong*, 116 S. Ct. at 1486 (explaining that the selective prosecution claim is an assertion that the prosecutor has brought charges against the defendant in violation of the defendant's constitutional rights).

7. *Id.*; *Wayte*, 470 U.S. at 608.

8. *See* Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 588-89 (implying, in dicta, that a selective prosecution claim might be a complete defense to a criminal prosecution). *But see Armstrong*, 116 S. Ct. at 1484 n.2. (noting that the Supreme Court had never determined the appropriate remedy for a successful selective prosecution claim). In *Two Guys from Harrison-Allentown, Inc.*, the appellant, a corporation that operated a large discount department store in Pennsylvania, sought to enjoin the enforcement of a Sunday closing law based on alleged selective application of the law. *See* 366 U.S. at 585-86. The Court rejected appellant's claim. *See id.* at 588-89. The Court observed that "[s]ince appellant's employees may defend against any such proceeding that is actually prosecuted on the ground of unconstitutional discrimination, we do not believe that the court below was incorrect in refusing to exercise its injunctive powers." *Id.*

A selective prosecution claim qualifies as a pre-trial objection based upon a defect in the institution of prosecution. *See* United States v. Bryant, 5 F.3d 474, 476 (10th Cir. 1993). The claim is waived on appeal unless the defendant raises it before trial. *See id.* (citing United States v. Nichols, 937 F.2d 1257 (7th Cir. 1991)).

9. *Wayte*, 470 U.S. at 608 (stating that selective prosecution claims are correctly evaluated "according to ordinary equal protection standards"). The Supreme Court has utilized this two-part equal protection analysis in previous cases involving facially neutral statutes with discriminatory effects based on race or gender. *See* Barry Lynn Creech, Note, *And Justice for All:* Wayte v. United States *and the Defense of Selective Prosecution*, 64 N.C. L. REV. 385, 401 (1986). For example, in *Washington v. Davis*, black applicants for police officer positions purported racial discrimination based on an employment test that "excluded" blacks in proportionately greater numbers than whites. *See* 426 U.S. 229, 232-33 (1976). Applying an equal protection analysis, the Court stated that discriminatory effect was not the "sole touchstone" of racial discrimination forbidden by the Constitution. *See id.* at 242. The Court asserted that a discriminatory purpose also must be proved, although such purpose need not be express and may be inferred from the "totality of the relevant facts." *Id.* at 240-42. The *Washington* Court, however, refused to infer a discriminatory purpose of the employment test even though the test had a disproportionately negative impact on black applicants. *See id.* at 246 (noting the relationship of the test to police training, the racial composition of the recruit classes, and the affirmative efforts of the police department to recruit black officers).

not, however, articulated the necessary showing required of a defendant for discovery of government materials to bolster the selective prosecution claim.[10] Instead, the federal circuits were left to determine the

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In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, a nonprofit real estate developer, who had contracted to purchase a tract of land, alleged racial discrimination because of the local authorities' refusal to change the tract from a single-family to a multi-family zone. *See* 429 U.S. 252, 254-56 (1977). The Court reaffirmed its holding in *Washington*, that the disproportionate impact of any official action, while not determinative, is relevant in the consideration of discriminatory effect. *See id.* at 264-65. The Court further required proof of discriminatory purpose as a motivating factor to show a violation of the Equal Protection Clause. *See id.* at 265-66. The Court next identified objective factors relevant in proving discriminatory intent. *See id.* at 266-68 (listing such factors as the impact of the official action, the historical and administrative background, and any departures from normal practice); *see also infra* note 101 (providing a list of factors demonstrative of discriminatory intent as articulated by the *Arlington Heights* Court). The Court found that the real estate developer had failed to prove that discriminatory intent motivated the local authorities' decision not to change the classification of the land. *See Arlington Heights*, 429 U.S. at 269-70 (observing that the present zoning classification had existed for seventeen years, that the rezoning request followed standard procedure, and that the authorities had attempted to accommodate the developer in other ways).

In *Personnel Administrator of Massachusetts v. Feeney*, the Supreme Court upheld a Massachusetts veterans' preference statute that favored qualifying veterans for civil service positions over qualifying non-veterans. *See* 442 U.S. 256, 281 (1979). A female civil servant alleged that "the absolute-preference" statute discriminated against females because of their sex and consequently violated their equal protection rights. *Id.* at 259. The Court conceded the foreseeable adverse consequences of the statute to women. *See id.* at 278. Yet, the Court stated that, "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' 'not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279 (citation omitted). The Court ruled that the statute did not deprive women of equal protection because, under the totality of the circumstances, the law favored veterans of either sex. *See id.* at 279-80.

A demonstration of both prongs of the Court's equal protection analysis is not necessary in all cases. A defendant need not make a demonstration of discriminatory intent in those rare cases involving an overtly discriminatory classification. *See Wayte*, 470 U.S. at 608 n.10 (citing Strauder v. West Virginia, 100 U.S. 303, 308-09 (1880) (involving the systematic exclusion of blacks from juries which was itself such unequal application of the law as to show intentional discrimination)); *Arlington Heights*, 429 U.S. at 266 (holding that the Court will infer discriminatory intent from disproportionately adverse effects when the impact of facially neutral legislation indicates a stark pattern of discrimination); Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (asserting a presumption of racial discrimination when nearly 400 black voters were excluded from a voting district after redistricting); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (inferring intentional discrimination because the government directed the enforcement of a laundry ordinance solely at those of Chinese ancestry); *see also infra* note 101 (describing situations in which the courts will infer discriminatory intent based upon the severe discriminatory effects of a facially neutral law).

10. *Cf. Wayte*, 470 U.S. at 607 n.8 (noting a division in the federal circuits on the selective prosecution claim's prima facie case). In deciding the plaintiff's equal protection claim, the Court considered only whether the plaintiff demonstrated a prima facie case for selective prosecution. *See id.* at 606, 610; *infra* notes 96-125 and accompanying text (discussing the Supreme Court's decision in *Wayte* and its ramifications).

threshold showing for such discovery.[11] Not until *United States v. Armstrong*,[12] did the Supreme Court determine the necessary standard of discovery in the context of selective prosecution claims.[13]

In an eight-to-one decision, the Supreme Court held that in order to establish the discriminatory effect prong of the selective prosecution test, a defendant must demonstrate "that similarly situated individuals of a different race were not prosecuted."[14] Specifically, the Court held that Rule 16 of the Federal Rules of Criminal Procedure[15] does not, by itself, allow a defendant to examine government materials for the preparation of selective prosecution claims.[16] Instead, the Court ruled that to be entitled to discover government materials to support a selective prosecution claim, a defendant must make a threshold showing that similarly situated defendants of other races could have been prosecuted, but were not.[17] Discovery is warranted under these circumstances because it tends to show the existence of the discriminatory effect element of the selective prosecution claim.[18]

On April 21, 1992, the *Armstrong* respondents were indicted in the United States District Court for the Central District of California on fed-

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11. *See* United States v. Armstrong, 116 S. Ct. 1480, 1488 (1996). The *Armstrong* Court noted that a majority of the circuit courts that had considered the issue in the context of a selective prosecution claim required presentment of some evidence that similarly situated defendants of different races were not prosecuted. *See id.*; *see also* Tobin Romero, Note, *Liberal Discovery on Selective Prosecution Claims: Fulfilling the Promise of Equal Justice*, 84 GEO. L.J. 2043, 2048 n.33 (1996) (noting that in a majority of the circuits, a defendant is required to demonstrate "a colorable basis of selective prosecution;" some evidence tending to prove the selective prosecution claim).

12. 116 S. Ct. 1480 (1996).

13. *See id.*

14. *Id.* at 1487.

15. FED. R. CRIM. P. 16. Rule 16 provides:

> Upon request of the defendant the government shall permit the defendant to inspect the copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of [the defendant's] defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

Id. 16(a)(1)(C).

16. *See Armstrong*, 116 S. Ct. at 1485.

17. *See id.* at 1489; *see also infra* notes 178-94 and accompanying text (explaining the *Armstrong* Court's analysis on the threshold of discovery for selective prosecution claims).

18. *See Armstrong*, 116 S. Ct. at 1488 (noting that "we consider what evidence constitutes 'some evidence tending to show the existence' of the discriminatory effect element" (quoting United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974))).

eral crack and firearms offenses.[19] All of the respondents indicted were black.[20] In response to their indictments, the respondents filed a motion for discovery, or alternatively, for dismissal, alleging that the respondents' race motivated the prosecutor's decision to prosecute in federal court.[21] The district court granted the respondents' discovery motion[22] and dismissed the case when the government refused to comply with the discovery order.[23] On appeal, the United States Court of Appeals for the Ninth Circuit reversed.[24]

The Ninth Circuit agreed to rehear the case en banc to define the proper standard governing discovery for a selective prosecution claim.[25] In a seven-to-four decision, the Ninth Circuit en banc panel reversed the decision of the three-judge panel and affirmed the district court's discovery order.[26] The en banc panel held that a defendant seeking to obtain discovery must demonstrate a colorable basis of selective prosecution, but is not required to demonstrate that similarly situated defendants who could have been prosecuted were not.[27]

The Supreme Court reversed the Ninth Circuit en banc panel's affirmance of the district court's discovery order, concluding that the evidence presented by the respondents failed to demonstrate the essential elements of a selective prosecution claim.[28] The Court stated that the respondents were required to show the government did not prosecute others who were similarly situated who were a different race.[29] The respondents had identified those of the same race who were prosecuted, but

19. *See id.* at 1483; *see also infra* notes 160-62 and accompanying text (explaining the factual circumstances and statutory law underlying the respondent's offenses).

20. *See Armstrong*, 116 S. Ct. at 1483.

21. *See id.* Respondents attached to their motion a Paralegal's affidavit and a study that demonstrated that as of 1991, every federal crack case tried by the Office of the Federal Public Defender involved a black defendant. *See id.*; *see also infra* note 164 and accompanying text (explaining the study submitted by the respondents).

22. *See Armstrong*, 116 S. Ct. at 1484; *see also infra* note 166 and accompanying text (explaining the district court's decision to grant the respondents' motion for discovery).

23. *See Armstrong*, 116 S. Ct. at 1484; *see also infra* note 168 and accompanying text (explaining the scope of the district court's order and its reasoning).

24. *See* United States v. Armstrong, 21 F.3d 1431, 1438 (9th Cir. 1994), *rev'd en banc*, 48 F.3d 1508 (9th Cir. 1995) (en banc), *rev'd*, 116 S. Ct. 1480 (1996); *see also infra* notes 174-75 and accompanying text (outlining the justifications for the Ninth Circuit's reversal).

25. *See* United States v. Armstrong, 48 F.3d 1508, 1510 (9th Cir. 1995) (en banc), *rev'd*, 116 S. Ct. 1480 (1996). The Ninth Circuit resolved the case en banc. *See id.*

26. *See id.* at 1516.

27. *See id.*; *see also infra* note 174 and accompanying text (surveying the en banc court's articulation of the threshold for discovery).

28. *See Armstrong*, 116 S. Ct. at 1489.

29. *See id.* at 1488.

failed to identify similarly situated individuals who were not black, who could have been prosecuted under the same charges as respondents, but were not.[30] Thus, because the respondents were not entitled to additional discovery, the Court ruled that their evidence in the district court failed to demonstrate that an abuse of prosecutorial discretion resulted in their selection for federal crack and firearm offenses.[31] Likewise, Rule 16 of the Federal Rules of Criminal Procedure[32] did not authorize the respondents to examine government documents when preparing selective prosecution claims.[33] In its review of the respondents' prima facie case of selective prosecution, the *Armstrong* Court held that in order to establish the discriminatory effect prong of the test, the respondents must sufficiently demonstrate that similarly situated individuals of different races from the respondents could have been prosecuted, but were not.[34]

The Court justified such a high threshold for discovery in selective prosecution claims on the premise that a majority of the federal circuits required a defendant to establish that the government failed to prosecute others similarly situated.[35] The majority defended its contention that Rule 16 did not entitle the respondents to greater discovery rights in selective prosecution claims, asserting that the Rule applied only to an examination of government documents for defense against the government's case-in-chief.[36] Accordingly, the Court deemed the demonstration of the discriminatory effect prong of the prima facie case of selective prosecution through evidence of similarly situated persons to be consistent with ordinary equal protection requirements.[37]

This Note examines the development of the selective prosecution claim, in particular, its relation to the broad constitutional grant of

30. *See id.* at 1489. The en banc panel noted that a claim of selective prosecution raises an implicit suspicion that an unconstitutional selection has occurred and that, therefore, the respondents need not demonstrate a comparison pool of similarly situated individuals of different races in order to obtain discovery. *See id.* at 1488.

31. *See id.* at 1489. Absent evidence that similarly situated defendants could have been prosecuted, but were not, the respondents' claim that they were selected unconstitutionally for prosecution due to their race had no basis. *See id.*; *see also infra* text accompanying notes 184-87 (illustrating the deficiencies of the respondents' case).

32. *See* FED. R. CRIM. P. 16.

33. *See Armstrong*, 116 S. Ct. at 1485; *see also infra* notes 188-94 and accompanying text (explaining the *Armstrong* Court's interpretation of Rule 16).

34. *See Armstrong*, 116 S. Ct. at 1487.

35. *See id.* at 1488; *see also infra* note 182 (illustrating the holdings of the circuit courts of appeals which have considered the threshold of discovery in the context of selective prosecution cases).

36. *See Armstrong*, 116 S. Ct. at 1485; *see also infra* notes 191-94 and accompanying text (explaining the symmetry of Rule 16's language).

37. *See Armstrong*, 116 S. Ct. at 1487.

prosecutorial discretion and the evolution of its threshold of discovery. First, this Note demonstrates the nexus between the broad grant of prosecutorial discretion and the stringent requirements of the selective prosecution claim. Next, this Note argues that the Supreme Court has pronounced an articulable selective prosecution claim while failing to address the requisite threshold showing for discovery to support the claim. This Note then asserts that *Armstrong* refines the selective prosecution claim to correspond with ordinary equal protection standards, while requiring a strict threshold of discovery. This Note concludes that *Armstrong*'s treatment of the discovery threshold is exacting, effectively making discovery of governmental materials impossible given the requisite evidentiary showing defendants are required to make.

I. THE BROAD GRANT OF PROSECUTORIAL DISCRETION

The Constitution grants the executive branch broad prosecutorial discretion to enforce the nation's laws.[38] Thus, the judicial branch is disinclined to scrutinize exercises of that executive discretion.[39] In the ordinary case, the decision to prosecute and the choice of what charge to bring rests entirely with the prosecutor.[40] "[I]n the absence of clear evi-

38. *See* U.S. CONST. art. II, § 3. The Constitution grants this power to prosecutors because they are charged with the responsibility to help the President discharge his constitutional duty to "take Care that the Laws be faithfully executed." *Id.* The United States Code also codifies grants of prosecutorial discretion. *See* 28 U.S.C. §§ 516, 547 (1994). The full text of 28 U.S.C. § 516 provides that "[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General." *Id.* § 516. The full text of 28 U.S.C. § 547 provides that:

> Except as otherwise provided by law, each United States attorney, within his district, shall—
>
> (1) prosecute for all offenses against the United States;
>
> (2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned;
>
> (3) appear in behalf of the defendants in all civil actions, suits or proceedings pending in his district against collectors, or other officers of the revenue or customs for any act done by them or for the recovery of any money exacted by or paid to these officers, and by them paid into the Treasury;
>
> (4) institute and prosecute proceedings for the collection of fines, penalties, and forfeitures incurred for violation of any revenue law, unless satisfied on investigation that justice does not require the proceedings; and
>
> (5) make such reports as the Attorney General may direct.

Id. § 547.

39. *See* Wayte v. United States, 470 U.S. 598, 607 (1985) (recognizing the reluctance of the judiciary to involve itself in the review of prosecutorial discretion).

40. *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by stat-

dence to the contrary," therefore, courts will assume that prosecutors "properly discharged their official duties."[41]

Selective prosecution claims require courts to exercise judicial power over a special province of the executive branch, namely, the power to enforce the nation's criminal laws.[42] Thus, given the broad grant of prosecutorial discretion,[43] a defendant must present "clear evidence to the contrary" to dispel the presumption that a prosecutor has not violated equal protection guarantees.[44]

Courts are particularly hesitant to probe the government's decision to prosecute for several reasons.[45] First, the decision to prosecute is ill-suited to judicial review.[46] Second, judicial scrutiny of a prosecutor's de-

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ute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."); *see also* Town of Newton v. Rumery, 480 U.S. 386, 396 (1987) (stating that "courts normally must defer to prosecutorial decisions as to whom to prosecute"); United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982) (affirming the *Bordenkircher* Court's broad allocation of prosecutorial protection, and stating that the "validity of a pretrial charging decision must be measured against the broad discretion held by the prosecutor to select the charges against an accused"); Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980) (stating that the "legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process"); United States v. Batchelder, 442 U.S. 114, 124 (1979) (stating that it is within the prosecutor's discretion "[w]hether to prosecute and what charge to file or bring before a grand jury").

41. United States v. Chemical Found., Inc., 272 U.S. 1, 14-15 (1926). In an adversarial legal system, federal prosecutors need not act as a detached and disinterested party in the exercise of prosecutorial duties. *See Jerrico, Inc.*, 446 U.S. at 248. Given the constitutional interests at stake, prosecutors are "permitted to be zealous in the [] enforcement of the law." *See id.* Those interests include an "accurate finding of facts and application of law, and [the preservation of] a fair and open process for decision." *Id.*

Some commentators, however, have criticized the judicial deference granted to prosecutors in the exercise of prosecutorial power. *See* Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 303 (1980) (questioning which branch is best suited to make prosecutorial decisions). *See generally* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1554-60 (1981) (arguing that the existing prosecutorial discretion system is too expansive and interferes with the fair and equal administration of justice).

42. *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985) (stating that the decision of a federal prosecutor to indict lies exclusively with the executive branch because the Executive is charged by the Constitution to "take Care that the Laws be faithfully executed" (quoting U.S. CONST. art. II, § 3)).

43. *See supra* notes 41-42 and accompanying text (explaining the deference granted by the judiciary to prosecutors regarding the execution of the prosecutor's duties).

44. *Chemical Found, Inc.*, 272 U.S. at 14-15.

45. *See Wayte*, 470 U.S. at 607-08; *see also infra* note 46-47 (listing the problems and costs of judicial review pronounced by the *Wayte* Court regarding a prosecutor's decision to prosecute).

46. *See Wayte*, 470 U.S. at 607. Regarding decisions to prosecute, the *Wayte* Court enunciated specific considerations that the judiciary could not adequately review. *See id.* The pronounced factors included: (1) "the strength of the case;" (2) "the prosecution's general deterrence value;" (3) "the Government's enforcement priorities;" and (4) "the

cision to file charges imposes systematic costs on the criminal justice system.[47] A prosecutor's discretion, however, is not completely unfettered; it is limited by important constitutional constraints.[48] One such constraint is the equal protection component of the Fifth Amendment Due Process Clause.[49] Thus, the government's decision to prosecute may not be based on improper racial classifications.[50] The selective prosecution claim is one way a defendant can successfully demonstrate an equal protection violation through evidence of discriminate administration of a criminal law.[51]

II. HISTORICAL OVERVIEW OF THE REQUIREMENTS OF THE SELECTIVE PROSECUTION DEFENSE

A. Yick Wo v. Hopkins: *The Origin of the Selective Prosecution Claim*

Constitutionally recognized equal protection standards govern selective prosecution claims.[52] The Supreme Court, in *Yick Wo v. Hopkins*,[53]

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case's relationship to the Government's overall enforcement plan." *Id.*

47. *See id.* The *Wayte* Court articulated three specific costs incurred when the judiciary examines the prosecutor's decision to prosecute. *See id.* The first cost concerns the potential delay of the underlying criminal proceeding. *See id.* Examination of a prosecutor's charging decision diverts the criminal proceedings from the central issue of determining the defendant's guilt or sustaining the defendant's innocence, resulting in delay that can be damaging to the criminal process. *See* Cobbledick v. United States, 309 U.S. 323, 325 (1940) (noting that the swift enforcement of the criminal law promotes the administration of justice, whereas delay undermines that administration). The second cost articulated by the *Wayte* Court concerned the chilling effect on law enforcement caused by judicial scrutiny of prosecutorial charging decisions. *See Wayte*, 470 U.S. at 607. Finally, the Court noted that judicial inquiry of charging decisions would undermine prosecutorial effectiveness because such inquiry entailed the disclosure of prosecutorial strategy. *See id.*

48. *See* United States v. Batchelder, 442 U.S. 114, 125 (1979) (stating that the prosecutor's discretion is subject to constitutional constraints).

49. *Cf.* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (noting that the Equal Protection Clause is a safeguard against unfair discrimination); *see also supra* note 2 (quoting the pertinent text of the Fifth Amendment regarding the prohibition on the deprivation of liberty without due process of law).

50. *See* Oyler v. Boles, 368 U.S. 448, 456 (1962); *see also supra* note 5 and accompanying text (listing the unjustifiable standards that may not be considered in the decision to prosecute).

51. *See* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (invalidating a criminal ordinance making wooden laundry operations unlawful upon evidence that solely persons of Chinese ancestry were prosecuted). *Yick Wo* involved a facially neutral ordinance regulating public laundry facilities. *See id.* at 357. Given the disparate administration of the ordinance, the Court found that the government had violated the plaintiff's equal protection rights. *See id.* at 373-74.

52. *See Wayte*, 470 U.S. at 608 (stating that selective prosecution claims are governed by "ordinary equal protection standards").

53. 118 U.S. 356 (1886).

first considered the requisite equal protection standard applicable to a selective prosecution claim.[54] The Supreme Court held that absent proof of an explicit discriminatory classification in a criminal law, a defendant successfully may challenge a selective prosecution under the law if he demonstrates that the law had discriminatory effects.[55] That is, the ordinance will be held violative of the Equal Protection Clause if the defendant demonstrates that persons of different races in "similar circumstances" were not prosecuted under the ordinance.[56] In addition, the defendant must demonstrate that the government's intent to discriminate against members of the defendant's race resulted in the difference in prosecutorial treatment.[57]

In *Yick Wo*, a San Francisco ordinance made it unlawful to maintain a wooden laundry operation without the consent of the City board of supervisors.[58] Persons of Chinese ancestry owned approximately 240 of the total 320 laundry operations in San Francisco.[59] About 310 of the total number of laundries were constructed of wood.[60] The plaintiff, Yick Wo, and more than 150 of his countrymen, were arrested for violating the ordinance while others, who were not of Chinese ancestry and who maintained laundry facilities under "similar conditions" to Yick Wo, were not arrested.[61] Although neutral on its face, the statistical evidence demonstrated that the ordinance was applied in a discriminatory fashion.[62] That evidence revealed that the government prosecuted only those of Chinese descent.[63]

The Supreme Court held that when a facially neutral statute is directed exclusively towards members of one race, those persons are denied equal protection under the law.[64] Accordingly, because the government offered no rational explanation for its discriminatory administration of the ordinance, the government intentionally discriminated against Yick Wo and

54. *See* United States v. Armstrong, 116 S. Ct. 1480, 1487 (1996) (explaining that the origins of the selective prosecution claim and its requisite prongs stemmed from the Court's holding in *Yick Wo*).

55. *See Yick Wo*, 118 U.S. at 373-74.

56. *See id.*

57. *See id.* at 374.

58. *See id.* at 357 (noting that the ordinance regulated the type of building used to operate a laundry facility).

59. *See id.* at 358-59.

60. *See id.* at 359.

61. *See id.*

62. *See id.* (providing statistical evidence of the discriminatory application).

63. *See id.*

64. *See id.* at 373.

members of his race.[65] The discriminatory application of the ordinance demonstrated its discriminatory effect.[66] The Court, therefore, struck down the ordinance as unconstitutional.[67]

B. Ah Sin v. Wittman: *Evidence of Similarly Situated Defendants Required to Demonstrate Selective Prosecution*

Several decades later, the Supreme Court further developed the similarly situated requirement for the discriminatory effect prong of the selective prosecution defense in *Ah Sin v. Wittman*.[68] The City of San Francisco imprisoned Ah Sin, a subject of China, alleging that he violated a county ordinance prohibiting gambling tables in barricaded rooms.[69] Ah Sin petitioned a California state court for a writ of habeas corpus, seeking release from imprisonment.[70] In the habeas corpus petition, Ah Sin alleged that only citizens of Chinese ancestry were subjected to the ordinance in violation of the Equal Protection Clause.[71] The Supreme Court rejected the equal protection claim because Ah Sin's petition did not allege that the ordinance was facially neutral, or that other similarly situated offenders of different races were not subjected to the ordinance.[72]

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65. *See id.* at 374. The government presented no justification for the discriminatory administration of the ordinance. The Court thereby concluded that no rational reason for the discriminatory administration existed, except hostility toward Yick Wo's race. *See id.*

66. *See id. Armstrong* interpreted the *Yick Wo* Court's language of "similar conditions" as parallel to the concept of "similarly situated," and, accordingly, demonstrative of the discriminatory effect prong of the selective prosecution claim; *cf.* United States v. Armstrong, 116 S. Ct. 1480, 1487 (1996) (asserting that evidence presented in *Yick Wo* regarding the operation of laundries "under similar conditions" as those run by people of Chinese ancestry but which were not subject to the ordinance amounted to a demonstration of similarly situated defendants who could have been prosecuted but were not).

67. *See Yick Wo*, 118 U.S. at 374.

68. 198 U.S. 500 (1905).

69. *See id.* at 503. The ordinance prohibited the use of gambling tables in a room barred or barricaded for purposes of thwarting police access and intervention. *See id.*

70. *See id.* at 504-05. A writ of habeas corpus enables a party to be brought before a court or judge to secure release from unlawful imprisonment. *See* BLACK'S LAW DICTIONARY 709 (6th ed. 1990) (citing People *ex rel.* Luciano v. Murphy, 290 N.Y.S. 1011, 1016 (N.Y. Crim. Ct. 1936)). The scope of the writ covers all constitutional challenges. *See* Fay v. Noia, 372 U.S. 391, 417 (1963).

71. *See Ah Sin*, 198 U.S. at 507.

72. *See id.* at 507-08. The Court noted that Ah Sin did not allege that solely those of Chinese Ancestry were subjected to the ordinance or that other similarly situated offenders of other races or national origins were not subjected to it. *Id.* Therefore, the Court concluded that there was no violation of Ah Sin's right to equal protection guaranteed under the Fourteenth Amendment. *See id.* at 508 (noting that in *Yick Wo*, the constitutional challenge was successful because convincing evidence existed of the discriminatory application of the criminal ordinance); *see also infra* note 76 and accompanying text (explaining

Ah Sin's petition amounted to mere allegations of the discriminatory effect of the ordinance without supporting evidence.[73] The Court distinguished *Ah Sin* from *Yick Wo*, noting that Yick Wo had demonstrated discriminatory administration of a criminal ordinance through credible evidence of the government's administration of the law.[74] Thus, the *Ah Sin* Court held that the discriminatory administration of a law is ultimately a "matter of proof," the burden of which rests upon the charging plaintiff.[75] Ah Sin presented no such evidence of the ordinance's discriminatory administration.[76] The Court thereby determined that the plaintiff failed to establish the requisite elements of a selective prosecution claim.[77]

C. Oyler v. Boles: *Arbitrary Classifications, Discriminatory Intent, and a Prima Facie Case for Selective Prosecution*

It was not until 1962 that the Supreme Court again addressed the issue of selective prosecution in the case of *Oyler v. Boles*.[78] The Supreme Court held that some selectivity in the enforcement of criminal laws does not violate the equal protection guarantee unless a defendant demon-

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the deficiencies of Ah Sin's evidence of his selective prosecution claim).

73. *See Ah Sin*, 198 U.S. at 507; *see also infra* note 76 and accompanying text (noting that Ah Sin presented no evidence of the criminal ordinance's discriminatory application).

74. *See Ah Sin*, 198 U.S. at 507.

75. *See id.* at 508. The *Ah Sin* Court necessitated evidence of similarly situated offenders to demonstrate discriminatory administration of a criminal ordinance, stating:

> No latitude of intention should be indulged in a case like this. There should be certainty to every intent. Plaintiff in error seeks to set aside a criminal law of the State, not on the ground that it is unconstitutional on its face, not that it is discriminatory in tendency and ultimate actual operation as the ordinance was which was passed on in the *Yick Wo* case, but that it was made so by the manner of its administration. This is a matter of proof, and no fact should be omitted to make it out completely, when the power of a Federal court is invoked to interfere with the course of criminal justice of a State.

Id. Ah Sin failed to offer proof of discriminatory administration and the Court, therefore, rejected his claim. *See id.*

76. *Cf. id.* at 507 (stating that Ah Sin did not allege that other similarly situated offenders of different races were not subjected to the ordinance). Ah Sin presented no evidence of a statistical disparity between those of Chinese ancestry who were convicted under the ordinance and those who were not of Chinese ancestry who were not convicted under the ordinance. *See id.* at 506 (alleging only "'[t]hat said ordinance and the provisions thereof are enforced and executed . . . solely and exclusively against persons of the Chinese race, and not otherwise'"). Ah Sin's equal protection defense amounted to a mere assumption of discriminatory administration given the lack of evidence of such administration. *See id.* at 507-08. In contrast, Yick Wo presented evidence to the Court showing that only those of Chinese ancestry were charged with operating wooden laundries and was more successful in his claim. *See Yick Wo*, 118 U.S. at 374.

77. *See Ah Sin*, 198 U.S. at 508.

78. 368 U.S. 448 (1962).

strates that "the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."[79] Although the Court never mentioned the phrase "selective prosecution" in its opinion, it announced the requisite showing necessary to demonstrate discriminatory intent of the claim.[80]

In this consolidated case, the petitioners William Oyler and Paul Crabtree, were serving life sentences under West Virginia's habitual offender statute.[81] The petitioners filed separate writs of habeas corpus in the West Virginia Supreme Court of Appeals.[82] The Taylor County Circuit Court of West Virginia convicted William Oyler of second degree murder on February 5, 1953.[83] During Oyler's sentencing, the West Virginia prosecuting attorney alleged that Oyler had been convicted of three prior offenses in Pennsylvania which were punishable by imprisonment.[84] The Court agreed with the prosecutor and imposed a mandatory sentence of life imprisonment under West Virginia's habitual offender statute.[85]

Paul Crabtree pleaded guilty to check forgery in West Virginia.[86] The state court deferred sentencing and the prosecuting attorney subse-

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79. *Id.* at 456.

80. *See id.* In order to prove discriminatory intent, a defendant must prove that an unconstitutional consideration, such as the defendant's race, motivated the prosecutor's decision to bring charges. *See* Romero, *supra* note 11, at 2047.

81. *See Ah Sin*, 198 U.S. at 449. West Virginia's habitual criminal statute mandates the imposition of a life sentence upon a third conviction "of a crime punishable by confinement in a penitentiary." W. VA. CODE § 6130 (1961) (*current version at* § 61-11-18 (1992)). Actual imprisonment for prior convictions is not required under the statute. *See* State *ex rel.* Johnson v. Skeen, 87 S.E.2d 521, 523-24 (W. Va. 1955) (interpreting the statute as requiring only that imprisonment in a penitentiary *could have been imposed* for previous convictions). The prosecuting attorney files an information upon conviction and before sentencing to invoke the penalty. W. VA. CODE § 6131 (1961) (*current version at* § 61-11-19 (1992)).

82. *See Oyler*, 368 U.S. at 449. Without elaborating, the Supreme Court of Appeals of West Virginia denied both Oyler's and Crabtree's petitions. *See id.* Oyler's petition appealing the judgment alleged that West Virginia's statute violated the Fourteenth Amendment Equal Protection Clause because it had been applied only to a small number of those offenders who could have been subject to its provisions. *See id.* Crabtree also claimed an equal protection violation in his writ. *See id.* at 451; *see also supra* note 70 (providing general background on the writ of habeas corpus).

83. *See Oyler*, 368 U.S. at 449.

84. *See id.* at 450.

85. *See id.*; *see also supra* note 81 (explaining West Virginia's habitual offender statute). Oyler admitted to the Court the accuracy of the information, even after his attorney cautioned him of the ramifications of admitting such facts. *See Oyler*, 368 U.S. at 450. The Court imposed the statutorily mandated life sentence, recommending Oyler be paroled as soon as possible. *See id.*

86. *See Oyler*, 368 U.S. at 450. Check forgery was punishable by a sentence of two to ten years imprisonment. *See id.*

quently discovered that Crabtree had been convicted of two previous felonies.[87] Crabtree admitted his prior convictions in open court, and the judge sentenced him to life imprisonment under West Virginia's habitual offender statute.[88] Both Oyler and Crabtree asserted Fourteenth Amendment equal protection violations.[89] Both petitioners alleged that the trial courts selectively applied West Virginia's habitual offender statute.[90]

The United States Supreme Court rejected the contention that the petitioners had suffered an equal protection violation.[91] The statistics offered by the petitioners showed only that a high percentage of those eligible for the habitual offender statute were not sentenced under the statute.[92] Furthermore, the Court stated that mere selectivity in enforcement of a criminal law was not in itself a violation of equal protection without evidence that race, religion, or some other arbitrary classification motivated the selective practices.[93] Both petitioners failed to assert that they intentionally were selected and subjected to the habitual offender statute because they did not fall within any of those arbitrary classifications.[94] Thus, Oyler and Crabtree's equal protection claims failed.[95]

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87. *See id.* (noting that Crabtree had been convicted in the states of Washington and West Virginia).

88. *See id.* at 451; *see also supra* note 81 (illustrating the instances in which West Virginia's habitual offender statute imposes a life sentence).

89. *See Oyler*, 368 U.S. at 454; *supra* note 3 and accompanying text (explaining that the Fourteenth Amendment Equal Protection Clause is applicable when a state denies a person the equal protection of the laws).

90. *See Oyler*, 368 U.S. at 455. In his petition, Oyler presented evidence that during a 15-year period in the Taylor County Circuit Court, six men were habitual offenders as defined under the habitual offender statute but were not sentenced accordingly. *See id.* at 454-55. While the other five men had three or more prior adult felony convictions, Oyler's former convictions concerned juvenile offenses. *See id.* at 455. Oyler also presented evidence that as many as 904 men in West Virginia were habitual offenders but were not sentenced as the habitual offender statute mandated. *See id.* In support of the latter allegation, Oyler attached statistical data based upon prison records. *See id.* In his petition, Crabtree presented similar statistical evidence. *See id.*

91. *See id.* at 456.

92. *See id.* No evidence existed to suggest that the records of those with prior convictions who were not sentenced under the statute were available to the prosecutors. *See id.* Thus, the prosecutor's lack of knowledge of those prior convictions of those persons excused the failure to prosecute those persons. *See id.* The Court held that a failure to prosecute others because of a lack of knowledge of their prior offenses did not violate Fourteenth Amendment equal protection standards. *See id.*

93. *See id.*

94. *See id.* (observing that statistical implications of selective enforcement alone are not sufficient evidence of deliberate selection).

95. *See id.*

D. Wayte v. United States: *A Modern Claim for Selective Prosecution Defined: Discriminatory Effect and Discriminatory Intent*

It was not until *Wayte v. United States*,[96] that the Supreme Court articulated the modern criterion for the selective prosecution defense.[97] Constitutionally recognized equal protection standards govern selective prosecution claims.[98] In order to prove a selective prosecution claim, the defendant must show that the government's enforcement of a facially neutral law had a discriminatory effect and the enforcement was motivated by a discriminatory purpose.[99] To prove the first prong of the test, that of discriminatory effect, the defendant must demonstrate that others similarly situated to the defendant have not been prosecuted.[100] To establish the second prong, that of discriminatory intent or purpose, the defendant must prove selection for prosecution based on an impermissible reason such as race, religion, or other arbitrary classification.[101]

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96. 470 U.S. 598 (1985).

97. *See id.* at 608.

98. *Id.*

99. *See id.* at 608 (citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976)).

100. *Cf. id.* at 609-10 (stating that the discriminatory effect prong cannot be demonstrated if the government treated the defendant and others subject to the same offense similarly).

101. *See id.* at 608. Proof of discriminatory intent, therefore, requires a demonstration that the prosecutor selected the defendant "at least in part 'because of,' not merely 'in spite of,'" that unjustifiable classification. *Id.* at 610 (quoting Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)). Proof of intent may be demonstrated through direct or circumstantial evidence. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977); Washington v. Davis, 426 U.S. 229, 239-42 (1976); Romero, *supra* note 11, at 2047. The *Arlington Heights* Court articulated seven factors that courts should consider as circumstantial evidence of intentional discrimination. *See* 429 U.S. at 266-68. The first factor involves disparities in the administration of the law. *See id.* at 266. A disparity can arise where a "clear pattern" of discriminatory effect emerges from state action based on facially neutral legislation. *See id.*; Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886) (noting that only the hostility of those administering a facially neutral criminal ordinance explained the circumstantial evidence that only those of Chinese ancestry were prosecuted under the ordinance). In cases involving a significant statistical disparity, discriminatory intent is demonstrated when no justifiable explanation for the government's administration of the facially neutral law exists. *See Arlington Heights*, 429 U.S. at 266 & n.13; David L. Lock, Note, *Constitutional Law—Passive Enforcement of Draft Registration: Does It Constitute Selective Prosecution in Violation of Equal Protection Because It Discriminates Against Persons Based on Their Exercise of First Amendment Rights?*—United States v. Wayte, 710 F.2d 1385 (9th Cir. 1983), *cert. granted*, Wayte v. United States, 467 U.S. 1214 (1984), 57 TEMP. L.Q. 671, 677 n.47 (1984) (stating that courts will infer a discriminatory intent from the discriminatory effect of state action only in instances of grave equal protection deprivations). Thus, no other evidence of discriminatory intent is required in those rare cases involving overtly discriminatory classifications.

The facts underlying *Wayte* involved a Presidential Proclamation issued by President Jimmy Carter[102] which required a certain class of males born during 1960 to register with the Selective Service System.[103] Petitioner Wayte fell within that class of males but, nonetheless, failed to register.[104] Instead, petitioner wrote letters to government officials, including the President, stating his intention not to register.[105] His letters were placed in a Selective Service file containing information of men who disclosed their intent not to register or who were reported as failing to register.[106] The Selective Service maintained a policy of "passive enforcement," consisting of investigating and prosecuting only those non-

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See Creech, *supra* note 9, at 401 n.135. Such cases are rare, however. *See Arlington Heights*, 429 U.S. at 266. Evidence of discriminatory effect alone will not satisfy the equal protection claim's discriminatory intent prong if the pattern of discriminatory administration is not as severe as that in *Yick Wo*. *See id.* Other circumstantial evidence of discriminatory intent, therefore, must be produced. *See id.*

Other evidence of discriminatory intent includes the historical background of the legislature's decision to institute a facially neutral law. *See id.* at 267. This factor proves particularly relevant if it uncovers objectionable purposes underlying the official action. *See id.* A third factor includes the sequence of events leading up to the decision. *See id.* A fourth factor includes deviations from ordinary procedures. *See id.* A fifth factor includes the decision maker's substantive departure from normal considerations in the decision making. *See id.* A sixth factor includes the legislative or administrative history. *See id.* at 268. Finally, direct testimony by the decision maker also can be considered evidence of discriminatory intent, although consideration of direct testimony of the decision maker is utilized in only extraordinary circumstances. *See id.* The *Arlington Heights* Court advocated avoidance of judicial inquiry into the motivations of the legislative or executive branches, as it represented an encroachment on the other branches of government. *See id.* at 268 n.18 (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)). The Court also noted the non-exhaustive nature of the potential factors of circumstantial evidence demonstrating discriminatory intent. *See id.* at 268.

102. *See* Proclamation No. 4771, 3 C.F.R. 82 (1981) (providing the guidelines of registration for the draft applicable to male citizens over the age of eighteen). President Jimmy Carter issued the Proclamation pursuant to his authority under the Military Selective Service Act. *See* Military Selective Service Act § 3, 50 U.S.C. app. § 453(a) (1994). This section provides that:

> [I]t shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

Id.

103. *See Wayte*, 470 U.S. at 601.

104. *See id.*

105. *See id.* Wayte stated: "I will never register for your draft," in his letter to the President. *Id.* at 601 n.2. Wayte also stated he would "'be traveling the nation . . . encouraging resistance and spreading the word about peace and disarmament.'" *Id.*

106. *See id.* at 601.

registration cases contained in the file.[107] The Selective Service wrote to each reported violator in accordance with this policy;[108] Wayte did not respond to this letter.[109]

The Selective Service sent to the United States Department of Justice the names of Wayte and others identified for investigation and potential prosecution under the passive enforcement system.[110] The Department of Justice referred those names to the Federal Bureau of Investigation (F.B.I.) for further examination.[111] The United States Attorneys for the districts in which the nonregistrants resided also were notified.[112] Consequently, the United States Attorney indicted Wayte for intentionally "failing to register with the Selective Service."[113]

Wayte moved to dismiss the indictment on selective prosecution grounds, arguing that he and other indicted nonregistrants were "vocal" opponents of the draft who were intentionally targeted for prosecution because they had exercised their First Amendment rights.[114] The District Court for the Central District of California granted Wayte's request for discovery and ordered government officials to produce documents.[115]

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107. *See id.*

108. *See id.* The letter explained to each nonregistrant his duty to register and requested that each person either comply with the law or explain why he had not registered. *See id.* at 602. The letter also contained a warning that a violation of the law could result in criminal prosecution. *See id.*

109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.* The United States Attorney for the Central District of California sent a letter to Wayte requesting registration and threatening prosecution for failure to do so pursuant to a "beg" policy in which F.B.I. agents and United States Attorneys would attempt to persuade nonregistrants to register. *See id.* Wayte refused to respond even after the President extended the period to comply with the law, and after F.B.I agents interviewed him. *See id.* at 602-03.

The Department of Justice recognized that under the passive enforcement system, nonregistrants were liable to be either "vocal proponents" against the draft or "persons with moral or religious objections." *Id.* at 603. The Department of Justice further acknowledged that prosecutions under the passive enforcement system could result in counterclaims involving violations of the nonregistrants' constitutional rights. *See id.* The Department sought indictments of those nonregistrants who continued to refuse to register after the Department became aware that the Selective Service could not speedily initiate an active enforcement system. *See id.*

113. *Id.*

114. *See id.* at 604. Of 286 nonregistrants, 13 were indicted. *See id.* at 604 n.3 (noting that the rest "either registered, were ... not ... subject to registration requirements, could not be found, or were under continuing investigation"). An estimated 674,000 nonregistrants were not subject to the passive enforcement system. *See id.* at 604.

115. *See id.* The government, arguing executive privilege, declined to comply fully with the district court's discovery order and moved for a dismissal of the indictment so

The Court of Appeals for the Ninth Circuit reversed on the grounds that Wayte had not satisfied the discriminatory intent prong of the selective prosecution test.[116] The Supreme Court granted certiorari[117] on the issue of whether the passive enforcement policy amounted to the selective prosecution of persons who articulated their intent not to register for the draft.[118]

After articulating the criteria for the selective prosecution test, the Supreme Court determined that Wayte had not satisfied either prong.[119] Wayte failed to establish discriminatory effect as he presented no evidence of similarly situated persons who could have been prosecuted, but were not.[120] Furthermore, the Court found no evidence of discriminatory intent.[121] Wayte failed to demonstrate that his prosecution resulted from an impermissible consideration.[122] The Court, therefore, concluded that the passive enforcement system did not violate the equal protection component of the Fifth Amendment.[123] The indictments were upheld solely on the ground that Wayte had failed to prove both elements of the

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that it could appeal the discovery order. *See id.* The district court dismissed the indictment because the government failed to rebut the selective prosecution claim. *See id.* at 604-05. The district court articulated the standards for selective prosecution as: (1) discriminatory effect proved through evidence of similarly situated defendants who were not prosecuted; and (2) discriminatory intent demonstrated by evidence that impermissible considerations motivated the selection. *See id.* at 605.

116. *See id.* at 606. The Ninth Circuit found no evidence that impermissible considerations influenced Wayte's prosecution. *See id.* (asserting that the government's application of the passive enforcement system was justified because the nonregistrants were either unreported and remained unknown or reported and expressly refused to register for the draft).

117. *See* Wayte v. United States, 467 U.S. 1214 (1984) (stating order granting certiorari).

118. *See Wayte*, 470 U.S. at 607.

119. *See id.* at 610 (concluding that a selective prosecution claim fails absent a showing of both discriminatory effect and purpose).

120. *See id.* The government treated the 286 reported nonregistrants in a similar fashion. *See id.* (noting the similarity in the government's investigation and prosecution of nonregistrants and vocal nonregistrants such as Wayte).

121. *See id.*

122. *Cf. id.* (stating that the evidence demonstrated only that the government had knowledge of the consequences of the passive enforcement policy; the prosecution of vocal nonregistrants). No evidence existed that the government intentionally selected Wayte for prosecution due to his speech. *See id.* at 610-11. The speech in question consisted of the letters Wayte had sent to government officials and the President. *See id.* at 601 n.2; *see also supra* note 105 (explaining the general content of the letters). However, at least one commentator has suggested that the totality of the circumstances exhibited the government's discriminatory intent. *See* Creech, *supra* note 9, at 405.

123. *See Wayte*, 470 U.S. at 614; *see also supra* note 4 (explaining the application of the equal protection component of the Fifth Amendment to the federal government).

selective prosecution claim.[124] The Court, however, did not consider the issue of Wayte's right to discover government documents in order to support his selective prosecution claim.[125]

E. Hunter v. Underwood: *Demonstration of a Successful Selective Prosecution Claim*

The Supreme Court again applied the selective prosecution analysis in *Hunter v. Underwood*.[126] The Supreme Court invalidated a provision of the Alabama Constitution of 1901 that disenfranchised persons convicted of crimes involving moral turpitude.[127] Pursuant to the Alabama Consti-

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124. *See Wayte*, 470 U.S. at 610.

125. *Cf. id.* at 614-15 (Marshall, J., dissenting) (stating that Wayte demonstrated enough evidence to warrant discovery of government documents relevant to his selective prosecution claim and that, therefore, the Court improperly dismissed that claim). Justice Marshall's dissent asserted that the issue before the Court should have been confined to whether Wayte had produced enough evidence to warrant discovery of governmental material in relation to the Selective Service's passive enforcement policy. The Court refused to consider whether the plaintiff was entitled to government documents relevant to the claim of selective prosecution because the discovery issue was not raised at any stage of the appellate proceedings. *See id.* at 605 n.5 (noting that the issue was neither raised in the petition for certiorari, briefed on the merits, nor raised at oral argument). Justice Marshall, however, argued that the Court was empowered to consider the threshold for discovery necessary for selective prosecution even if the plaintiff had not requested that the Court contemplate the discovery issue. *See id.* at 622-23 n.1 (Marshall, J., dissenting). Justice Marshall stated that:

> [I]t is curious that the Court here professes such concern about whether the discovery issue was properly presented. Indeed, the Court chooses to address Wayte's claim that the prosecution scheme placed a direct burden on the exercise of First Amendment rights. That claim was not presented or ruled upon by the District Court, was not presented or ruled upon on appeal, and was not raised in Wayte's petition for certiorari.

Id. at 622 n.1 (citation omitted). Justice Marshall asserted that to prevail on the discovery issue, Wayte need only show "that the District Court applied the correct legal standard and did not abuse its discretion in determining that [Wayte] had made a non-frivolous showing of selective prosecution entitling him to discovery." *Id.* at 615. Justice Marshall concluded that the district court correctly resolved the discovery issue. *See id.* Justice Marshall argued that the Supreme Court could not reject Wayte's claim on the merits given Wayte's limited access to evidence without discovery. *See id.* at 621. Justice Marshall asserted a "colorable basis" showing as the proper threshold for discovery in a selective prosecution claim. *See id.* at 623. A defendant must present specific non-frivolous facts that demonstrate the merits of the claim in order to make a "colorable basis" showing. *See id.* at 623 (citing United States v. Hazel, 696 F.2d 473, 475 (6th Cir. 1983)).

126. 471 U.S. 222 (1985).

127. *See id.* at 233; ALA. CONST. art. VIII, § 182 (1901), *repealed by* amend. no. 579. Section 182 of the 1901 Alabama Constitution provides in part:

> The following persons shall be disqualified both from registering, and from voting, namely:
>
> All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution;

tution, the Board of Registrars for Montgomery and Jefferson Counties blocked Carmen Edwards, a black, and Victor Underwood, a white, from voter polls because each had been convicted of bouncing a check.[128] Edwards and Underwood sued the Montgomery and Jefferson Boards of Registrars under 42 U.S.C. §§ 1981[129] and 1983[130] for civil rights violations, requesting an invalidation of the constitutional provision and an injunction against any future application.[131] Edwards claimed that the Alabama constitutional framers intentionally adopted the disenfranchisement provision to exclude blacks from voting based on race, and that the provision advanced that intended effect.[132]

> those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude . . . .

ALA. CONST. art. VIII, § 182 (1901). Disenfranchisment occurred by blocking those convicted for crimes involving moral turpitude from the voter polls. *See Hunter*, 471 U.S. at 224.

128. *See Hunter*, 471 U.S. at 223-24. The Board of Registrars relied on the Alabama Attorney General's opinion in determining that crimes of moral turpitude included the misdemeanor of bouncing a check. *See id.* at 224.

129. 42 U.S.C. § 1981 (1994). This statute guarantees all persons of different races the same legal rights. *See id.* Section 1981(a) states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id. § 1981(a).

130. *Id.* § 1983. Section 1983 provides a cause of action against those who have infringed upon the constitutional rights of another, and states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

131. *See Hunter*, 471 U.S. at 224. The case proceeded to trial on separate causes of action. *See id.*

132. *See id.* In an unreported decision, the district court held that Edwards and Underwood did not demonstrate that the constitutional convention enacted § 182 out of racial motivations. *See id.* The United States Court of Appeals for the Eleventh Circuit reversed. *See* Underwood v. Hunter, 730 F.2d 614, 621 (11th Cir. 1984), *aff'd*, 471 U.S. 222 (1985). In finding a violation of the Fourteenth Amendment Equal Protection Clause, the court of appeals utilized the mixed motive analysis established in *Arlington Heights* and *Mt. Healthy City School District Board of Education v. Doyle*. *See id.* at 617. Under such

The Supreme Court invalidated section 182 on equal protection grounds.[133] The Court reasoned that both elements of the selective prosecution claim had been satisfied.[134] Direct evidence existed that the state had enacted the constitutional provision with the intent to disenfranchise blacks.[135] Edwards and Underwood also presented evidence that the state law had a discriminatory effect on blacks as compared to whites, because blacks were nearly two times as likely as whites to suffer disenfranchisement under the provision.[136] The Court, therefore, acknowledged the similarly situated requirement of the discriminatory effect prong, although it did not precisely identify it as such.[137] The Court held section 182 violative of the Fourteenth Amendment Equal Protection Clause because the defendants met both prongs of the selective prosecution test.[138]

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analysis, the Eleventh Circuit held that a racist disposition towards blacks inspired the enactment of § 182. *See id.* at 619-21. The Eleventh Circuit, therefore, held that § 182 violated the Fourteenth Amendment. *See id.* at 621.

133. *See Hunter*, 471 U.S. at 233.

134. *Cf. id.* at 227-31 (explaining that the defendants met both the discriminatory effect and discriminatory intent prongs of their equal protection claim).

135. *See id.* at 229-31. The evidence of the unjustifiable legislative intent consisted of the proceedings of the Alabama constitutional convention of 1901, historical studies, and the testimony of two expert historians. *See id.* at 229. At trial, an expert historian for the appellants testified that the 1901 convention aimed to prevent blacks from becoming a swing vote. *See id.* at 230. The expert stated that the disenfranchisement of blacks prevented a resurgence of populism and accomplished this aim. *See id.*

136. *See id.* at 227. The district court made no finding on the actual discriminatory effect of § 182. *See id.* However, the Eleventh Circuit found compelling evidence of discriminatory effect, citing a "registrars' expert" estimate that claimed by 1903, blacks were ten times more likely than whites to suffer disenfranchisement. *See id.* That same estimate found that as of the time of appeal in two counties blacks were 1.7 times more likely than whites to suffer disenfranchisement. *See id.*

137. *Cf. id.* (noting that the statistical disparity in the impact of § 182 on blacks provided evidence of the discriminatory effect of that section); *see also supra* note 136 (explaining the disparity). Thus, that impact adequately demonstrated a showing of similarly situated defendants who could have been prosecuted, but were not. *See Hunter*, 471 U.S. at 227; *see also* United States v. Armstrong, 116 S. Ct. 1480, 1487 (1996) (stating that the defendants produced indisputable evidence that § 182 "had a discriminatory effect on blacks as compared to similarly situated whites" and, thereby, met the similarly situated requirement for the selective prosecution claim). Accordingly, the legislative history of § 182 and the stark statistical disparity in that section's enforcement provided evidence of discriminatory intent. *See Hunter*, 471 U.S. at 229-31; *see also supra* note 101 (explaining the circumstances in which a statistical disparity alone justifies a finding of discriminatory intent).

138. *See Hunter*, 471 U.S. at 233.

F. Wade v. United States: *Discovery to Bolster a Selective Prosecution Claim in the Context of Prosecutorial Discretion*

The Supreme Court considered a defendant's discovery request for prosecutorial materials necessary to bolster his selective prosecution claim in *Wade v. United States*.[139] The issue before the Court was whether a federal court could review the government's decision not to file a motion to reduce a defendant's sentence because the defendant had assisted the prosecution.[140] In determining the scope of the federal court's review powers, the Supreme Court also considered whether the government based its decision on an impermissible consideration.[141] The Court held such a decision was reviewable.[142] Furthermore, the Court noted, in dictum, that discovery was appropriate in such a situation if the defendant demonstrated a threshold showing that an unjustifiable consideration influenced the prosecutor's decision.[143] Because petitioner Wade did not meet that threshold showing, he could not obtain discovery.[144]

Petitioner Harold Wade, Jr. was arrested on October 30, 1989, when police found 978 grams of cocaine, two handguns, and more than $22,000 in his residence.[145] After the search, Wade provided law enforcement officials with information that led to the arrest of another alleged drug dealer.[146] A federal grand jury indicted Wade for distributing cocaine and possessing cocaine with the intent to distribute, conspiring to possess and distribute cocaine, and using or carrying a firearm during a drug crime, all in violation of federal statutes.[147] Wade pled guilty to all counts.[148] Wade received a mandatory minimum sentence of ten years for the drug counts, and a mandatory minimum sentence of five years for the gun count.[149] At the sentencing hearing, Wade's attorney suggested

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139. 504 U.S. 181 (1992).

140. *See id.* at 183.

141. *See id.*

142. *See id.*

143. *See id.* at 186.

144. *See id.*

145. *See id.* at 183.

146. *See id.*

147. *See id.* Respectively, Wade was indicted for violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 846, and 18 U.S.C. § 924(c)(1). *See id.*

148. *See id.*

149. *See id.* at 183-84. The provision for the mandatory minimum sentence for the drug counts states in pertinent part:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

that the court impose a sentence less than the mandatory minimum for the drug counts to "reward" Wade for assisting the government.[150] The court responded that it could not sentence Wade for less than the mandatory minimum, absent a government motion requesting the same.[151] When no such motion was made, the district court sentenced Wade to 180 months imprisonment.[152] The Fourth Circuit denied Wade relief from the sentence imposed, refusing to inquire into the prosecutor's motives for failing to file a motion requesting a reduction in sentencing.[153]

On ultimate appeal, the Supreme Court held that constitutional limitations restricted the prosecutor's discretion to submit a motion requesting sentencing for less than the mandatory minimum.[154] The Court stated that the "federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion."[155] A defendant, therefore,

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(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance .

(B) In the case of a violation of subsection (a) of this section . . . such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . . .

21 U.S.C. § 841(a), (b)(1)(B) (1994). The provision for the mandatory minimum sentence for the gun count states in pertinent part:

Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . .

18 U.S.C. § 924(c)(1) (1994).

150. *See Wade*, 504 U.S. at 183.

151. *See id.* The government may file a motion to sentence a defendant below the mandatory minimum according to 18 U.S.C. § 3553(e). *See* 18 U.S.C. § 3553(e) (1996). The section states in relevant part:

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

Id. § 3553(d), (e).

152. *See Wade*, 504 U.S. at 183.

153. *See* United States v. Wade, 936 F.2d 169, 171 (4th Cir. 1991), *aff'd* 504 U.S. 181 (1992). The court of appeals reasoned that such inquiry would unjustifiably invade upon the prosecutor's discretion. *See id.* at 172.

154. *See Wade*, 504 U.S. at 185; *see also supra* note 2 and accompanying text (explaining the Fifth Amendment's constitutional limitations on prosecutorial discretion).

155. *Wade*, 504 U.S. at 185. To review a prosecutor's refusal to file a substantial-

would be entitled to relief if a prosecutor failed to file such a motion based on the defendant's race or religion.[156] The Court then held that a defendant would be entitled to discovery to assist him in preparing the selective prosecution claim if he made a "substantial threshold showing."[157] The Court denied Wade discovery, however, reasoning that Wade failed to make such a showing because he failed to allege that the government refused to file a motion based on Wade's race, religion, or some other suspect reason.[158]

III. *UNITED STATES V. ARMSTRONG*: SELECTIVE PROSECUTION AND THE THRESHOLD FOR ITS DISCOVERY

The Supreme Court finally addressed the issue of discovery in the context of selective prosecution claims in *United States v. Armstrong*.[159] On April 21, 1992, respondents Christopher Lee Armstrong, Robert Rozelle, Aaron Hampton, Freddie Mack, and Shelton Auntwan Martin, each of whom are black, were indicted in the United States District Court for the

assistance motion, federal district courts must find that an unconstitutional consideration motivated such refusal. *See id.* at 186; *see also supra* note 2 and accompanying text (explaining the Fifth Amendment's constitutional limitations on prosecutorial discretion).

156. *See Wade*, 504 U.S. at 186.

157. *Id.*

158. *See id.* at 186-87.

159. 116 S. Ct. 1480, 1483 (1996).

Central District of California.[160] The respondents were indicted on federal charges of conspiring to possess with intent to distribute more than

160. *See id.*; Petitioners Brief at 2, United States v. Armstrong, 116 S. Ct. 1480 (1996) (No. 95-157). Three months prior to the indictment, from February to April 1992, agents of the Federal Bureau of Alcohol, Tobacco, and Firearms (ATF) and the Narcotics Division of the Inglewood, California police department penetrated the suspected crack ring through the use of three informants. *See Armstrong*, 116 S. Ct. at 1483; Petitioners Brief at 3, *Armstrong* (No. 95-157). On seven different occasions, the informants bought a total of 124.3 grams of crack from respondents and witnessed respondents carrying firearms. *See Armstrong*, 116 S. Ct. at 1483; Petitioners Brief at 3, *Armstrong* (No. 95-157). On April 8, 1992, the agents executed warrants to search the hotel room where the drug sales took place, as well as the residences of some of respondents. *See Armstrong*, 116 S. Ct. at 1483; Petitioners Brief at 3, *Armstrong* (No. 95-157). The agents arrested Armstrong and Hampton in the hotel room, seized an additional 9.29 grams of crack and a loaded gun, and subsequently arrested the other respondents as part of the ring. *See Armstrong*, 116 S. Ct. at 1483; Petitioner's Brief at 3, *Armstrong* (No. 95-157).

Because the government decided to prosecute the respondents on federal rather than state charges, the respondents faced the possibility of greater penalties. *Compare* 21 U.S.C. § 841 (b) (1994) (explaining federal penalties for various drug offenses), *with* CAL. HEALTH & SAFETY CODE §§ 11351.5, 11370 (West 1991) (explaining the California state penalties for drug offenses). Federal law imposes a mandatory minimum penalty of imprisonment for 10 years to life for the crime of possession with intent to distribute crack. *See* 21 U.S.C. § 841(b). If a respondent has one prior felony drug conviction, the sentence increases to a mandatory 20 years-to-life. *See id.* With two or more prior felony drug convictions, the sentence again increases to mandatory life without the possibility of parole. *See id.*

Under California state law, the crime for possession with intent to distribute 50 grams of crack carries a sentence of imprisonment for a period of either three, four, or five years. *See* CAL. HEALTH & SAFETY CODE § 11351.5. A defendant with no prior convictions may be granted probation. *Cf. id.* § 11370 (citing situations where probation is not available for individuals with prior convictions). The California State Court may impose an additional three-year consecutive sentence for each prior felony drug conviction. *See id.* § 11370.2.

In 1986, Congress enacted strict mandatory minimum sentences for narcotics dealers convicted in federal court in response to growing public concern about drug abuse. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 18, 21, and 31 U.S.C.); Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211-38, 98 Stat. 1987, 1987-2040 (codified as amended in scattered sections of 18 U.S.C. and at 28 U.S.C. §§ 991-98). Since the enactment of the federal mandatory minimums, the disproportionate impact of the Federal Sentencing Guidelines on racial and ethnic minorities has provoked widespread debate within the federal courts and among legal scholars and the media. *See, e.g.*, United States v. Moore, 54 F.3d 92, 99 (2d Cir. 1995) (stating that Congress did not act with discriminatory intent in drafting mandatory minimum sentencing schemes), *cert. denied*, 116 S. Ct. 793 (1996); United States v. Clary, 34 F.3d 709, 712 (8th Cir. 1994) (concluding that Congress did act in a racially discriminatory manner when it drafted the sentencing guidelines for crack cocaine offenses (citing United States v. Lattimore, 974 F.2d 971, 974-76 (8th Cir. 1992), *cert. denied*, 507 U.S. 1020 (1993), *cert. denied*, 513 U.S. 1182 (1995); David Cole, *The Paradox of Race and Crime: A Comment On Randall Kennedy's "Politics of Distinction,"* 83 GEO. L.J. 2547, 2553-62 (1995) (criticizing the argument that severe penalties for crack offenders benefit law-abiding members of the black community). *But cf.* Randall Kennedy, *The State, Criminal*

fifty grams of crack cocaine and conspiring to distribute the same.[161] The respondents also were charged with federal firearm offenses.[162]

In response to the indictment, the respondents filed a motion for discovery or, in the alternative, for dismissal.[163] The respondents alleged that race motivated the prosecutor's decision to prosecute them in federal court.[164] The district court granted the respondents' motion for discovery[165] on the theory that the evidence contained in the respondents' affidavit and accompanying study met the necessary threshold requirement for discovery in a selective prosecution case.[166]

Law, and Racial Discrimination: A Comment, 107 HARV. L. REV. 1255, 1267-69 (1994) (arguing that stiff penalties for crack offenders benefit the lawful members of the black community). *See generally* Ann Devroy, *Clinton Retains Tough Law on Crack Cocaine: Panel's Call to End Disparity In Drug Sentencing Is Rejected*, WASH. POST, Oct. 31, 1995, at A1 (discussing President Clinton's support for maintaining stiff federal penalties for crack cocaine offenses); David G. Savage, *Clinton OKs Bill Keeping Stiff Sentences for Crack*, L.A. TIMES, Oct. 31, 1995, at A4 (discussing the implications of continuing stiff federal penalties for crack cocaine offenses).

Federal law punishes crack rock cocaine traffickers much more severely than powder cocaine traffickers. *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY xii-xiii (1995) (stating that a federal defendant with five grams of crack would receive the same five-year minimum sentence as a defendant with 500 grams of powder cocaine). Another indicator of the disparity in treatment of black offenders is the fact that white crack dealers are more likely to be prosecuted in state court where penalties are usually more lenient. *See* H.R. REP. NO. 104-272, at 19-20 (1995), *reprinted in* 1995 U.S.C.C.A.N. 335, 352-53. Compounding the problem is the fact that blacks comprise a majority of crack traffickers. *See* U.S. SENTENCING COMM'N, *supra*, at 156, 161.

161. *See Armstrong*, 116 S. Ct. at 1483 (noting that the respondents were charged with violating of 21 U.S.C. § 841 (1994) and 21 U.S.C. § 846 (1994), respectively).

162. *See id.* (noting that the respondents were charged with violating 18 U.S.C. § 924(a)(1)(C) (1994)).

163. *See id.*

164. *See id.* In support of their motion, the respondents attached an affidavit by a "Paralegal Specialist" alleging that during 1991, only black defendants were involved in the cases closed by the Office of the Federal Public Defender concerning violations of 21 U.S.C. §§ 841 and 846. *See id.* Attached to this affidavit, the respondents submitted a "study" specifying, among other things, each defendant's race. *See id.* Other defendants had submitted this study in support of similar discovery motions in at least two other Central District cocaine prosecutions. *See id.* at 1483 n.1. One district court judge, however, dismissed the study as "statistically insignificant." *Id.*

Opposing the discovery motion, the government argued that the respondents did not establish the necessary threshold required for discovery in a selective prosecution case. *See id.* at 1484. Specifically, the government argued that the affidavit and accompanying study did not contain evidence that the government had acted unfairly, or had failed to prosecute defendants of other races. *See id.*

165. *See id.*

166. *See* Petitioner's Brief at 4, United States v. Armstrong, 116 S. Ct. 1480 (1996) (No. 95-157). In support of the respondents' discovery order, the district court considered significant "the number of cases and the time period covered by the affidavit; the compa-

The government filed a motion for reconsideration in response to the district court's discovery order.[167] The district court denied the govern-

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rable charges involved in each case; and the fact that all defendants were of the same race." *Id.*

The district court ordered the government:

> (1) to provide a list of all cases from the last three years in which the Government charged both cocaine and firearms offenses, (2) to identify the race of the defendants in those cases, (3) to identify what levels of law enforcement were involved in the investigations of those cases, and (4) to explain its criteria for deciding to prosecute those defendants for federal cocaine offenses.

Id.

167. *See Armstrong*, 116 S. Ct. at 1484. The government's affidavits and other evidence attached to its motion for reconsideration explained the government's reasons for prosecuting the respondents, and why the respondents' study did not support the conclusion that the government exclusively prosecuted blacks for federal crack offenses. *See id.*

Federal and local agents alleged in the affidavits that the respondents' race did not influence the government's investigation. *See id.*; Petitioner's Brief at 4, *Armstrong* (No. 95-157). The agents also alleged that the case had been chosen for federal prosecution because the federal drug and firearms offenses "met the U[nited] S[tates]Attorney's guidelines for federal prosecution." Petitioner's Brief at 4, *Armstrong* (No. 95-157). An Assistant United States Attorney explained that the criteria considered in charging decisions included the following factors: (1) whether the offense met the criteria of the United States Attorney's guidelines on federal offenses; (2) whether the evidence justified the charge; (3) whether the case encompassed a "deterrence value" and "federal interest"; and (4) whether the suspects had criminal histories. *See id.* at 4-5. Specifically, the Assistant United States Attorney stated that the decision to prosecute in a federal court in the respondents' cases met the general criteria for prosecution given the amount of cocaine involved, over twice the threshold necessary for imposition of a ten-year mandatory minimum sentence. *See id.* at 5. The Assistant United States Attorney also found the scope of the crack ring, involving multiple sales and defendants, relevant to the decision to prosecute. *See id.* Other considerations factoring in the decision included the defendants' additional federal firearm violations, the respondents' substantial criminal histories, and the strength of the evidence in the case. *See Armstrong*, 116 S. Ct. at 1484.

The government also referenced sections of the 1989 Drug Enforcement Administration (DEA) report which concluded that "[l]arge-scale, interstate trafficking networks controlled by Jamaicans, Haitians and Black street gangs dominate the manufacture and distribution of crack." *Id.* (alteration in original). The government also attached affidavit from the Public Information Officer for the Los Angeles Division of the DEA and a DEA report on crack which further stated that particular racial and ethnic groups dominate the distribution of certain particular drugs due to cultural, historical, and sociological reasons. *See* Petitioner's Brief at 5, *Armstrong* (No. 95-157). The DEA report based its assertions on evidence of the "sociological patterns of crack use and distribution in the" United States. *Id.*

The government accordingly provided an informal survey of Assistant United States Attorneys in the Central District of California which reported "11 non-black defendants . . . indicted on federal crack charges during the period covered by respondents' affidavit." *Id.* at 6; *cf.* Respondent's Brief at 29, United States v. Armstrong, 116 S. Ct. 1480 (1996) (No. 95-157) (arguing that, based on the ethnic nature of their surnames, all of the 11 defendants appeared to be of Hispanic origin).

The government, however, produced no evidence that it had prosecuted a white defendant in federal court for a cocaine-based offense. *See id.* Although not utilized in the *Armstrong* case, there is, indeed, evidence demonstrating the disparity of racial minorities

ment's motion.[168] Thereafter, the district court dismissed the indictment because the government indicated that it would not comply with the discovery order.[169] On appeal, a divided three-judge panel of the United States Court of Appeals for the Ninth Circuit reversed, holding that, due to the inherent concerns in a selective prosecution claim, defendants wishing to obtain discovery "must provide a colorable basis for believing that 'others similarly situated have not been prosecuted.'"[170]

The Ninth Circuit agreed to rehear the case, en banc, in order to resolve a recent conflict within the circuit over the proper standard governing discovery by a defendant who raises a selective prosecution claim.[171] In a seven-to-four decision, the en banc panel reversed the

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prosecuted in federal court for crack offenses. *See* United States v. Turner, 901 F. Supp 1491, 1496 (C.D. Cal. 1995), *rev'd*, 104 F.3d 1180 (9th Cir. 1997), *cert. denied*, 117 S. Ct. 1566 (1997), *and cert. denied*, 117 S. Ct. 1722 (1997). For example, the United States Attorney's office in Los Angeles had never prosecuted a white defendant in federal court for a crack offense as of 1992. *See id.* A 1992 investigation found that whites were neither prosecuted in most federal districts, nor had been prosecuted in 17 states for federal crack offenses. *See* H.R. REP. NO. 104-272, at 20 (1995) (noting that of the few white defendants prosecuted, only eight were convicted of federal crack offenses).

The respondents submitted an affidavit of one of their attorneys in response to the government's motion for reconsideration. *See Armstrong*, 116 S. Ct. at 1484. The affidavit purported that there is an equal proportion of white and minority crack users. *See id.* (noting that a drug treatment center's intake coordinator supplied this information). The respondents also submitted an affidavit of a criminal defense attorney alleging that blacks were much more likely to be prosecuted in federal court for crack offenses, and a newspaper article which reported that most black crack offenders were punished more severely than most white powder cocaine offenders. *See id.* at 1484 (citing Jim Newton, *Harsher Crack Sentences Criticized as Racial Inequity*, L.A. TIMES, Nov. 23, 1992, at A1).

168. *See Armstrong*, 116 S. Ct. at 1484. The district court concluded, in an unpublished decision, that the government failed to articulate its criteria for bringing cases involving crack and firearms offenses into federal court. *See* Petitioner's Brief at 6-7, *Armstrong* (No. 95-157).

169. *See Armstrong*, 116 S. Ct. at 1484. Curiously, the government suggested that the district court dismiss the indictments so that it could appeal the discovery order. *See* United States v. Armstrong, 48 F.3d 1508, 1510 (9th Cir. 1995) (en banc), *rev'd*, 116 S. Ct. 1480 (1996). The Supreme Court noted, however, that it had never determined the appropriate remedy for a successful selective prosecution claim. *See Armstrong*, 116 S. Ct. at 1484 n.2.

170. United States v. Armstrong, 21 F.3d 1431, 1436 (9th Cir. 1994) (quoting United States v. Wayte, 710 F.2d 1385, 1387 (9th Cir. 1983), *aff'd*, 470 U.S. 598 (1985)), *rev'd en banc*, 48 F.3d 1508 (9th Cir. 1995) (en banc), *rev'd*, 116 S. Ct. 1480 (1996). The court of appeals determined that the respondents' 24-case study failed to constitute a prima facie case for selective prosecution because it did not demonstrate that others similarly situated could have been prosecuted but were not. *See id.* The court of appeals, instead, determined that, most likely, the government chose to prosecute the respondents because it believed they had committed the crimes. *See id.* at 1437. The alleged protected class status of the respondents was thereby coincidental. *See id.*

171. *See Armstrong*, 48 F.3d at 1510; United States v. Redondo-Lemos, 955 F.2d 1296, 1302 (9th Cir. 1992). In *United States v. Redondo-Lemos*, the Ninth Circuit held that the

Ninth Circuit's earlier decision and affirmed the district court's order of dismissal, holding that "a defendant is not required to *demonstrate* that the government has failed to prosecute others who are similarly situated" in order to obtain discovery.[172] Instead, the en banc panel determined that discovery is appropriate when a defendant presents evidence providing a colorable basis for selective prosecution.[173] The en banc panel defined the standard as "'some evidence *tending* to show the essential elements of the claim.'"[174] The en banc panel concluded that the defen-

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government could be ordered to provide discovery only upon a prima facie showing of wrongful discrimination by a defendant. *See* 955 F.2d at 1302. By contrast, in *United States v. Bourgeois*, decided shortly after *Redondo-Lemos*, the Ninth Circuit adopted a colorable basis test holding that a prima facie showing of wrongful discrimination was not necessary. *See* 964 F.2d 935, 939 (9th Cir. 1992); *see also supra* note 11 (stating that in most federal circuits, a defendant is required to establish some evidence tending to show the elements of the selective prosecution claim).

172. *Armstrong*, 48 F.3d at 1516. The court of appeals recognized "that people of *all* races commit *all* types of crimes-not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group." *Id.* at 1516-17. The court reasoned that in order to be entitled to discovery of government materials, defendants do not have to demonstrate selective prosecution. *See id.* at 1512. The court viewed the evidence necessary to obtain discovery of such materials as "substantially less" than that required to demonstrate a prima facie case of the charge itself. *See id.*

173. *See id.*

174. *Id.* (quoting United States v. Heidecke, 900 F.2d 1155, 1159 (7th Cir. 1990)). "Some evidence" entailed more than a frivolous or conclusory showing. *See id.* This showing included the evidence a defendant presented as well as all other evidence presented to the judge, whether or not presented by the defendant. *See id.* The court held that in the face of such evidence the government must have the opportunity to present evidence that could dispel selective prosecution concerns. *See id.* Therefore, a judge is to determine a colorable basis in the context of all the presented evidence. *See id.* at 1516.

The Ninth Circuit noted that the *Redondo-Lemos* colorable basis standard articulated in *United States v. Bourgeois* had been modified. *See id.* at 1513 (citing United States v. Bourgeois, 964 F.2d 935 (9th Cir. 1992)). The *Bourgeois* court held that the "high threshold" of the colorable basis standard should rarely justify discovery. *See* 964 F.2d at 940. The en banc panel noted that *United States v. Bourgeois* modified the *Rendondo-Lemos* colorable basis standard. *See Armstrong*, 48 F.3d at 1513.

Second, the en banc panel noted that *Bourgeois* did not explain the necessary showing a prima facie case of selective prosecution entailed when the prosecutorial conduct had a discriminatory effect and purpose. *See id.* The en banc panel, recognizing that a selective prosecution claim draws upon ordinary equal protection standards, noted that the demonstration of an equal protection claim did not always require a direct showing of discriminatory intent. *See id.* The court instead found that evidence of discriminatory effect would support circumstantial evidence of discriminatory intent. *See id.*; *see also* Batson v. Kentucky, 476 U.S. 79, 93 (1986) (stating that "[c]ircumstantial evidence of invidious intent may include proof of disproportionate impact"). Thus, the en banc panel held that the requisite intent and evidence of discriminatory effect necessary to establish a prima facie case of selective prosecution could be achieved solely by proof of "statistical disparities." *See Armstrong*, 48 F.3d at 1513. The en banc panel rejected the contention that evidence of similarly situated defendants who could have been prosecuted, but were not, was necessary to demonstrate a prima facie case of selective prosecution. *See id.* at 1513 n.1.

dants presented enough evidence of a colorable basis that the government had engaged in selective prosecution.[175] The en banc panel also af-

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Third, the en banc panel concluded that the *Bourgeois* court did not adequately consider the evidentiary impediments surrounding the selective prosecution claim. *See id.* at 1514. Given the difficulty in obtaining the necessary data to support the claim, the en banc panel thereby imposed a lesser burden on the defendant. *See id.* The en banc panel held that to warrant discovery, defendants must make only good faith efforts to obtain and provide evidence of a colorable basis. *See id.* Defendants were, therefore, not required to present sophisticated statistical "analyses . . . that irrefutably demonstrate[d] the existence of prosecutorial bias." *Id.*

The en banc panel noted that the Third, Sixth, Seventh, Tenth, and District of Columbia Circuits all required higher showings of discriminatory prosecutions for discovery in selective prosecution claims. *See id.* The en banc panel noted that those five circuits permitted discovery when the defendant introduced evidence that tended to show the essential elements of the selective prosecution claim and the government failed to refute the defendant's showing. *See id.*

The en banc panel viewed the pronounced threshold for discovery as best reflecting the prevailing trend in the law and effectively accommodating the conflicting concerns that discovery presents in the context of a selective prosecution claim. *See id.* In doing so, the en banc court addressed the concern of maintaining the integrity of the criminal justice system and the separation of powers. *See id.* at 1514-15; *see also supra* notes 38-51 and accompanying text (discussing concerns of maintaining the integrity of the criminal justice system and the separation of powers); *infra* note 226 (illustrating prosecutorial discretion in the context of separation of powers issues). A defendant has an interest in freedom from abuse of prosecutorial discretion, whereas the government has an interest in freedom from judicial oversight in the exercise of that discretion. *See Armstrong*, 48 F.3d at 1515.

The en banc panel thought that the colorable basis threshold balanced the competing interests of the defendants and the government. *See id.* Yet, the standard also ensured that a defendant would not face insurmountable hurdles at the discovery stage. *See id.* Additionally, the standard protected the government's prosecutorial discretion from incessant judicial review predicated upon frivolous selective prosecution claims. *See id.*

175. *See Armstrong*, 48 F.3d at 1515. The en banc panel held that the district court did not abuse its discretion by granting the discovery order. *See id.* Not only did the statistical evidence suggest that the government disproportionately charge blacks with federal crack offenses, but the government also failed to refute the inference of racial discrimination in its prosecutorial decisions. *See id.* The en banc panel founded its analysis on the premise that all races commit all crimes. *See id.* at 1516-17. The en banc panel therefore considered unnecessary a demonstration that similarly situated persons of other races could have been prosecuted, but were not, even when the evidence suggested that only certain races committed certain offenses. *See id.* at 1517 n.6 (regarding a "'comparison pool'" unnecessary "when the record contain[ed] statistical evidence tending to show that only members of racial or ethnic minority groups have been prosecuted"). The en banc panel viewed the acceptance of a comparison pool of similarly situated persons of other races akin to the acceptance and perpetuation of the stereotype that only certain races commit crack offenses. *See id.*

The defendants presented evidence that only members of a racial minority, specifically black defendants, were prosecuted on federal crack charges. *See id.* at 1517. The government's evidence that other non-black minorities were prosecuted for federal crack charges did not refute the study, because the period in which such minorities were prosecuted did not coincide with the period covered by the defendants' study. *See id.* The government's failure to explain or refute the statistical evidence thus entitled the defendants to discovery. *See id.* at 1519.

firmed the district court's imposition of sanctions against the government for failure to comply with the discovery order.[176] The government ap-

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The en banc panel likewise rejected the government's contention that blacks, as a group, commit crack offenses in greater numbers than other racial groups. *See id.* at 1518. Such an assertion, based upon mere generalizations by DEA agents and not "expert sociological testimony," did not explain why black violators were more likely than non-black violators to be prosecuted in federal rather than state court. *See id.* The en banc panel dismissed the government's attempt to justify its charging decisions on race-neutral criteria as "vague, generalized, and even unspecified" and, thereby, insufficient to rebut the defendants' study. *Id.* at 1519. Finally, the en banc panel rendered impotent the government's contention that the defendants failed to present evidence of the government's discriminatory purpose regarding its prosecuting decisions in accordance with the en banc panel's holding that circumstantial evidence of discriminatory intent based solely on statistical disparities justified discovery. *See id.*

The defendants' study provided enough circumstantial evidence of intentional discrimination in the prosecutorial decisions of the government to warrant discovery. *See id.* The facts established in the defendants' study, therefore, demonstrated a colorable basis that the government had engaged in selective prosecution regarding the defendants. *See id.* Furthermore, according to the en banc court, the government's inept attempts to refute the colorable basis of selective prosecution failed to show that the district judge abused her discretion in the granting of the discovery order. *See id.* at 1519. The en banc court, therefore, affirmed the sanction of dismissal due to the government's failure to comply with the discovery order. *See id.* at 1520.

176. *See id.* Concurring in the judgment, Chief Judge Wallace agreed with the en banc majority that an appellate court should not overturn a district court's discovery order absent a district judge's clear error of judgment. *See id.* at 1521 (Wallace, C.J., concurring). Yet, Chief Judge Wallace rejected the majority's contention that the threshold for discovery in a race-based selective prosecution case should not be "high." *See id.* at 1520-21. Chief Judge Wallace believed that the majority should have followed *Bourgeois*, which held that a defendant's presentation of some evidence of the elements of a selective prosecution claim satisfied the threshold for discovery. *See id.* at 1520 (citing United States v. Bourgeois, 964 F.2d 935, 939 (9th Cir. 1992)). Chief Judge Wallace viewed the majority's standard, which entitled the defendant to discovery upon a non-frivolous showing of selective prosecution even absent evidence of similarly situated defendants, as establishing too low of a threshold. *See id.* Chief Judge Wallace concluded that judicial oversight of prosecutorial charging decisions would hinder effective law enforcement. *See id.* at 1520-21.

In contrast, the dissent believed that the majority "radically" rewrote selective prosecution law. *See id.* at 1522 (Rymer, J., dissenting). First, the dissent rejected the majority's contention that, in order to demonstrate a prima facie case for selective prosecution, the "same, insubstantial statistic" of racial disparity could prove both discriminatory effect and intent. *Id.* The dissent viewed the majority's reasoning as collapsing the separate and distinct prongs of selective prosecution. *See id.* Second, the dissent scorned the majority's attempt to lower the discovery threshold in a selective prosecution claim that, until then, explicitly had required the defendant to provide a colorable basis for the existence of discriminatory intent. *See id.*

Referring to the then-existing conflicting discovery standards in the Ninth Circuit, the dissent agreed with the majority that a uniform standard should govern the threshold of discovery in a selective prosecution case. *See id.* at 1524. The dissent, however, disagreed with the majority's allegedly severe modification of the *Bourgeois* "colorable basis" standard. *See id.* The dissent thought the holdings of *Bourgeois* and the majority of the federal circuits appropriately balanced the government's interest in broad prosecutorial dis-

pealed, and the Supreme Court granted certiorari to determine the discovery issue.[177]

A. The Armstrong *Majority: Crushing the Defendant's Chance for Discovery*

In articulating the threshold for discovery in selective prosecution claims, the *Armstrong* majority offered a cursory explanation. The Court reasoned that the justifications for a rigorous standard for selective prosecution claims required an equally "rigorous standard for discovery in aid of such a claim."[178] In addition, the costs of discovery troubled the majority.[179] The Court thought a rigorous threshold for discovery was

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cretion against a defendant's interest in freedom from discrimination. *See id.* at 1525-26. Also, the high showing on the merits of a selective prosecution claim necessitated the high threshold of discovery pronounced in *Bourgeois*. *See id.* at 1526.

The dissent regarded a high threshold appropriate given the courts' inability to adequately evaluate a prosecutor's charging decisions. *See id.* The dissent believed steady judicial oversight of prosecutorial charging decisions inevitably would lead to ineffective law enforcement. *See id.* Accordingly, the dissent asserted that a high threshold would "discourage fishing expeditions, protect legitimate prosecutorial discretion, safeguard government investigative records, and yet still allow meritorious claims to proceed." *Id.* (quoting United States v. Bourgeois, 964 F.2d 935, 940 (9th Cir. 1992)). The dissent also argued that a majority of the circuits had adopted the high hurdle. *See id.* at 1525 n.5; *see also infra* note 182 and accompanying text (explaining circuit court holdings regarding the requisite threshold of discovery in the context of selective prosecution). Summarizing the high threshold standard asserted in *Bourgeois*, the dissent stated that *Bourgeois* followed the majority view in accordance with *Wayte*, "appropriately balanc[ing]" the conflicting interests at stake. *See Armstrong*, 48 F.3d at 1527. For those reasons the dissent asserted that the *Bourgeois* standard should have been affirmed. *See id.* The dissent believed that a defendant's evidence of a colorable basis of discriminatory effect and intent warranted discovery. *See id.* at 1524. The dissent found that that the defendants' did not satisfy the colorable basis standard because the defendants' evidence did not meet acceptable standards of accuracy. *See id.* (specifically noting the narrow and faulty nature of the defendants' study).

Therefore, the dissent stated that the en banc panel should have denied discovery based upon the inconclusive data offered by the defendants. *See id.* Although the dissent acknowledged that the district court's decision concerning the discovery order should not be disturbed unless an abuse of discretion existed, the dissent would have reversed the district court's decision. *See id.* at 1527. Specifically, the dissent maintained that the district court erred as a matter of law in its misapplication of the selective prosecution standards promulgated in *Wayte*. *See id.*; *see also supra* notes 98-101, 119-24 and accompanying text (illustrating the *Wayte* standard for a prima facie case of selective prosecution).

177. *See* United States v. Armstrong, 116 S. Ct. 377 (1995).

178. United States v. Armstrong, 116 S. Ct. 1480, 1488 (1996). In so stating, the Court alluded to separation of powers concerns as well as the judicial inability to scrutinize a prosecutor's decision. *See id.* at 1486 (stating that "[a] selective-prosecution claim asks a court to exercise judicial power over a 'special province' of the Executive" (quoting Heckler v. Chaney, 470 U.S. 821, 832 (1985))); *see also supra* notes 38-51 and accompanying text (explaining judicial hesitancy to scrutinize exercises of prosecutorial discretion).

179. *See Armstrong*, 116 S. Ct. at 1488. The Court maintained that a requirement that

necessary to combat the many costs imposed on the government; costs that normally were incurred in response to a defendant's claim of selective prosecution.[180]

The Court rested its decision on the many federal circuit decisions that required a showing of similarly situated defendants who were not prosecuted.[181] The Court stated that a majority of the circuit courts require a showing of discriminatory effect and intent.[182] A majority of the courts of

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the government assemble documents to refute a defendant's claim of selective prosecution would divert the government's resources. *See id.* Such discovery also might disclose the government's prosecuting strategy. *See id.*

180. *See id.*; *see also supra* notes 40-44 and accompanying text (explaining the separation of powers issues inherent in the judicial review of a prosecutor's decision); *supra* note 47 and accompanying text (explaining that courts are ill-suited to make such reviews).

181. *See Armstrong*, 116 S. Ct. at 1488.

182. *See id.* (quoting United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974)); *see also* United States v. Parham, 16 F.3d 844, 847 (8th Cir. 1994) (stating that "[w]here a defendant cannot show anyone in a similar situation who was not prosecuted, he has not met the threshold point of showing that there has been selectivity in prosecution"); United States v. Fares, 978 F.2d 52, 60 (2d Cir. 1992) (holding that the trial court did not abuse its discretion in refusing to order discovery where the defendant did not produce "evidence as to large numbers of similarly situated persons known to the government who had not been prosecuted"); United States v. Peete, 919 F.2d 1168, 1176 (6th Cir. 1990) (denying discovery because the defendant "did not point to any evidence that others similarly situated were not prosecuted"); United States v. Penagaricano-Soler, 911 F.2d 833, 838 (1st Cir. 1990) (concluding that prosecutors did not treat the defendant, a Puerto Rican banker, more severely than similarly situated mainland bankers); C.E. Carlson, Inc. v. SEC, 859 F.2d 1429, 1437 (10th Cir. 1988) (refusing discovery because securities dealers "were unable to show that others similarly situated were not subjected to enforcement proceedings"); United States v. Gordon, 817 F.2d 1538, 1540 (11th Cir. 1987) (holding the defendant entitled to discovery of relevant government documents given the evidence that the government selectively prosecuted blacks in those counties where blacks constituted a majority of voters), *vacated on other grounds*, 836 F.2d 1312 (1988); United States v. Schmucker, 815 F.2d 413, 418-19 (6th Cir. 1987) (denying the defendant's discovery request given the lack of some evidence demonstrating others similarly situated who were not prosecuted); United States v. Greenwood, 796 F.2d 49, 52-53 (4th Cir. 1986) (denying discovery because the defendant failed to make a non-frivolous showing that others who were similarly situated had not been prosecuted); United States v. Mitchell, 778 F.2d 1271, 1277 (7th Cir. 1985) (explaining that a court will grant discovery only if a defendant shows a colorable basis for a selective prosecution claim, including some evidence that the defendant was singled out for prosecution while others were not); Attorney Gen. v. Irish People, Inc., 684 F.2d 928, 946 (D.C. Cir. 1982) (asserting that the party raising the selective prosecution claim has the burden of establishing that others similarly situated have not been prosecuted); United States v. Kahl, 583 F.2d 1351, 1355 (5th Cir. 1978) (holding a defendant's discovery of government documents unwarranted where the defendant did not establish a colorable claim of selective prosecution); United States v. Berrigan, 482 F.2d 171, 181 (3d Cir. 1973) (determining that appellants were not entitled to discovery because appellants failed to prove a "colorable entitlement" of selective prosecution). Accordingly, prior to the Supreme Court's holding in *Armstrong*, the Ninth Circuit premised discovery for a selective prosecution claim on "solid, credible evidence" that other similarly situated offenders had not been prosecuted. *See* United States v. Bourgeois, 964

appeals interpreted the words "some evidence" as requiring a showing that similarly situated defendants of other races could have been prosecuted, but were not.[183]

The Supreme Court concluded that the respondents' evidence did not meet the discovery threshold.[184] The evidence failed to demonstrate the threshold because it did not identify similarly situated persons who could have been prosecuted, but were not.[185] Respondents had identified only those prosecuted, omitting evidence of those who were not.[186] The Court disregarded the respondents' evidence consisting of a newspaper article and an affidavit of an attorney's conversation with a drug treatment cen-

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F.2d 935, 938, 940 (9th Cir. 1992).

The federal circuits have followed the *Armstrong* restrictive discovery standard. *See* United States v. Quinn, 123 F.3d 1415, 1425-26 (11th Cir. 1997) (denying discovery because the defendant failed to demonstrate that the government did not prosecute similarly situated white offenders who had possessed fewer than 50 grams of cocaine and used a firearm in connection with a drug offense or had a prior record of drug offenses); United States v. Berger, 103 F.3d 67, 71-72 (9th Cir. 1996) (stating that discovery, if requested by the defendant, would have been denied because the defendant failed to demonstrate that similarly situated offenders of other races committed crack and firearms offenses, but were not prosecuted), *cert. denied*, 117 S. Ct. 1456 (1997); United States v. Olvis, 97 F.3d 739, 745 (4th Cir. 1996) (denying discovery because the defendants failed to demonstrate comparison statistics that similarly situated whites who committed the same crack offenses were not prosecuted); United States v. Ochoa-Gutierrez, 95 F.3d 1159, 1159 (9th Cir. 1996) (denying discovery because the defendant failed to demonstrate that the government did not prosecute other aliens who illegally re-entered the country); United States v. Sepulveda, 952 F. Supp 94, 95-97 (D.R.I. 1996) (denying discovery because the defendants, male members of the Almighty Latin King Nation charged with conspiring to murder, failed to demonstrate that the government did not prosecute similarly situated female members of the organization as the evidence showed that the female members offered no more than "moral support"); United States v. Drake, 934 F. Supp. 953, 958, 964 (N.D. Ill. 1996) (denying discovery because the defendants, who participated in an Agricultural Stabilization and Conservation Service administered by the United States Department of Agriculture and were federally charged with the unlawful disposition of collateral, failed to demonstrate that other farmers involved in the same government program committed similar offenses and were not prosecuted); United States v. Roman, 931 F. Supp 960, 962, 967 (D.R.I. 1996) (denying discovery because the defendant, charged with racketeering and conspiring to commit murder and who sought government documents relating to the justifications for the death penalty, failed to establish that the defendant's race motivated the government's decision to prosecute, or that similarly situated offenders of other races were not prosecuted). *But cf.* United States v. Al Jibori, 90 F.3d 22, 23, 25-26 (2d Cir. 1996) (remanding the discovery issue to the district court because the government volunteered evidence regarding the number of prosecutions under the federal statute used to convicted the defendant, which supported the defendant's contention that the defendant's national origin motivated the government's prosecutorial decision).

183. *See supra* note 182 (explaining the courts of appeals utilization of the "similarly situated" standard).

184. *See Armstrong*, 116 S. Ct. at 1489.

185. *See id.*

186. *See id.*

ter employee as "hearsay and reported personal conclusions based on anecdotal evidence."[187]

The Court also held that Rule 16 of the Federal Rules of Criminal Procedure did not authorize the discovery of materials to assist the respondents in preparing their selective prosecution claims.[188] The Court found that Rule 16 applied only to the examination of government documents for defense against the government's case-in-chief.[189] Defendants could utilize Rule 16(a)(1)(C) as a "shield," and not as a "sword," in order to challenge the prosecution's conduct in a case.[190] The Court found the "shield-only" interpretation appropriate in light of the symmetry of the phrases contained in Rule 16(a)(1)(C): documents "'material to the preparation of the defendant's defense, and, in the very next phrase, documents 'intended for use by the government as evidence in chief at the trial.'"[191] Thus, the respondents could not use Rule 16(a)(1)(C) to discover government documents to support their selective prosecution claims because such discovery was offensive, not defensive as the Rule authorized.[192]

The Court also asserted that Rule 16(a)(2) established that Rule 16(a)(1)(C) "defense" applied only to responses to the government's case-in-chief.[193] Thus, according to the majority's understanding of Rule 16, the respondents could examine documents material to their defense under Rule 16(a)(1)(C), but, under Rule 16(a)(2), they could not examine the work product of the government in connection with the government's case-in-chief, including evidence of selective prosecution.[194]

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187. *Id.*

188. *See id.* at 1485 (holding that Rule 16(a)(1)(C) allowed defensive discovery of government documents, for the purpose of a defendant's defense against the government's case-in-chief, but not offensive discovery, such as a defendant's selective prosecution claim); *see also supra* note 15 and accompanying text (quoting the language of Rule 16).

189. *See Armstrong*, 116 S. Ct. at 1485; *see also infra* notes 190-94 and accompanying text (defining the Court's "shield-only" analysis).

190. *See Armstrong*, 116 S. Ct. at 1485. The majority did not cite case law or scholarly studies to support its contention that Rule 16 applied only to "shield-only" defenses. *See generally id.* (stating merely that the text of Rule 16 supported the "shield-only" reading).

191. *Id.* (quoting FED. R. CRIM. P. 16(a)(1)(C)).

192. *See id.*

193. *See id.* Rule 16(a)(2) exempts from discovery, "reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case." *Id.*

194. *See id.* at 1485 (stating that Rule 16(a)(2) defines the scope of "defense" contained in section (a)(1)(C) as a defendant's defense against the government's case-in-chief, but exempts from that scope government work-product evidence of selective prosecution).

In addition to the discovery threshold, the Court defined the test for a prima facie case of selective prosecution.[195] The Court held that in order to prove the discriminatory effect prong of selective prosecution, one must produce evidence that similarly situated offenders were not prosecuted.[196] The Court justified its holding out of concern for separation of powers and prosecutorial discretion.[197] The Court disagreed with the respondents' contention that the prior Supreme Court decisions of *Hunter v. Underwood*[198] and *Batson v. Kentucky*[199] did not require a demonstration of similarly situated persons.[200] The majority reasoned that although the *Hunter* Court did not expressly use the phrase "similarly situated," the Court nonetheless relied on evidence that blacks were nearly twice as likely as whites to be disenfranchised under Alabama's constitution.[201] To the *Armstrong* majority, this showing amounted to a demonstration of similarly situated defendants who could have been prosecuted, but were not.[202]

The majority also deemed *Batson* consistent with the proposition that the discriminatory effect requirement entails a showing of similarly situated defendants.[203] In *Batson*, the entire jury selection took place before the judge, who was well-equipped to determine whether an attorney excluded one group of jurors over another on the basis of an unjustifiable classification.[204] In cases involving peremptory challenges, an inference of intentional discrimination arises when the facts conclusively demonstrate that an attorney excused one group of jurors of the same race.[205]

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195. *See id.* at 1487-88.

196. *See id.* at 1487.

197. *See id.* at 1486-87; *see also supra* notes 38-51 and accompanying text (defining the nature and scope of the separation of powers issue and the broad grant of prosecutorial discretion).

198. 471 U.S. 222 (1985).

199. 476 U.S. 79 (1986). In *Batson*, the Supreme Court established the standards for evaluating a prima facie case of the discriminatory selection of jurors in a criminal trial. *See id.* at 96-97. A defendant must demonstrate that the prosecutor discriminatorily has removed jury members of the defendant's race. *See id.* at 96. The trial court evaluates evidence of the prosecutor's discriminatory intent under the totality of the circumstances, including, but not limited to, a "pattern" of peremptory challenges against jurors of a defendant's race, and the type of questioning directed toward jurors of the defendant's race during voir dire examination. *See id.* at 96-97.

200. *See Armstrong*, 116 S. Ct. at 1487-88.

201. *See id.* at 1487.

202. *See id.*

203. *Cf. id.* (rejecting the respondents contention that *Batson* made unnecessary a demonstration of similarly situated defendants).

204. *See id.* at 1488.

205. *See id.*

Thus, the Court in *Armstrong* distinguished *Batson*, explaining that in jury selection cases, a defendant need not show that members of other races were retained on the jury given the judge's presence during jury selection.[206] Thus, the stringent requirements of a selective prosecution claim's discriminatory effect prong were more akin to the *Hunter* situation, where the intent of the alleged constitutional violator remained unknown, thereby necessitating the need for convincing evidence that the particular acts had a discriminatory effect, rather than the *Batson* situation where the judge could adequately discern the discriminatory removal of jurors.[207]

B. The Concurring Opinions: Breyer Asserts Rule 16 Allows for Discovery of Government Materials

Both Justices Souter and Ginsburg filed separate concurrences[208] and both agreed that Rule 16 was not applicable to selective prosecution claims.[209] Justice Breyer's separate concurrence agreed with the majority opinion to the extent that the respondents failed to make a sufficient threshold showing for discovery, yet rejected that part of the majority's holding that a defendant could not invoke Rule 16 in selective prosecution claims.[210] In light of Rule 16's plain language, Justice Breyer contended that the Rule did not suggest that items "material to the preparation of the defendant's defense" covered only those items related to the government's case-in-chief.[211]

Justice Breyer also acknowledged the validity of the work product exemption under Rule 16(a)(2), but asserted that it had limitations.[212] The relevant section of Rule 16 was intended to prescribe the minimum amount of discovery to which parties are entitled, yet did not intend to

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206. *See id.* (asserting that judges are in the best position to discern patterns of a prosecution's discriminatory jury selection because such discrimination takes place before the judge, but that judges are ill-suited to discern a prosecutor's discriminatory charging decision because such decision takes place outside the judge's supervision).

207. *See id.* at 1487-88 (asserting that *Hunter* was compatible with the *Armstrong* requirements of a selective prosecution claim's discriminatory effect prong, and distinguishing *Batson*).

208. *See id.* at 1489 (Souter, J., concurring; Ginsburg, J., concurring).

209. *See id.* Justice Ginsburg allowed the possibility that Rule 16(a)(1)(C) may apply in other "defensive" contexts, such as an affirmative defense unrelated to the merits of a defendant's case. *See id.*

210. *See id.* at 1489-92 (Breyer, J., concurring in part and concurring in judgment).

211. *Id.* at 1490 (noting that the majority's interpretation of Rule 16 lacked "legal support" (citing FED. R. CRIM. P. 16(a)(1)(C))).

212. *See id.* at 1490 (alteration in original) (quoting United States v. Nobles, 422 U.S. 225, 239 (1975)).

limit a judge's discretion to order broader discovery in appropriate cases.[213] Justice Breyer asserted that judicial discretion permitted courts to issue discovery orders in the context of a selective prosecution claim.[214] Furthermore, Justice Breyer considered Rule 16(a)(2) irrelevant in this case because the respondents did not seek any work product from the government.[215] In Justice Breyer's view, the respondents need only have met the threshold requirement of Rule 16(a)(1)(C): that discovery be material to the defendant's defense.[216]

C. The Dissenting Opinion: Disparities in Drug Prosecution and Race Not to Be Dealt with Lightly

Justice Stevens asserted that the district court did not abuse its discretion in ordering the broad discovery order.[217] Justice Stevens contended that three considerations mandating judicial overview of certain drug prosecutions allowed for review of the district judge's order.[218]

Justice Stevens first addressed the high penalties for possession and distribution of crack.[219] His second consideration dealt with the severity of treatment on the federal level of crack offenders as compared to powder cocaine offenders.[220] His third consideration accepted the fact that the increased federal penalties for crack offenses disproportionally fell upon blacks.[221] In light of those factors, Justice Stevens argued that the respondents' evidence presented at trial permitted the district court to order discovery compelling the government to explain and justify the enforcement procedures regarding crack prosecutions involving blacks.[222]

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213. *See id.* at 1491.

214. *See id.*

215. *See id.*

216. *See id.*

217. *See id.* at 1492 (Stevens, J., dissenting). Justice Stevens, however, agreed with the majority that the district judge's power to order discovery for a selective prosecution claim did not lie in Rule 16. *See id.* Justice Stevens also agreed with the majority that the respondents' showing did not warrant discovery under either Rule 16 or the judge's discretionary power to grant discovery where appropriate. *See id.*

218. *See id.*

219. *See id.* at 1492-93.

220. *See id.* at 1493.

221. *See id.* at 1493-94. Indeed, there is evidence that blacks are subject to the federal sentencing guidelines for crack offenses more often than whites. *Compare id.* at 1493 (stating that although whites accounted for 65% of reported crack users in 1993, they comprised only 4% of federal crack defendants), *with* SPECIAL REPORT TO THE CONGRESS: COCAINE & FEDERAL SENTENCING POLICY, *supra* note 160, at 38-39, 156 (stating that although blacks made up only 38% of those reporting crack use at least once in 1994, they represented 88.3% of the federal crack offenders).

222. *See Armstrong*, 116 S. Ct. at 1495 (Stevens, J., dissenting).

Justice Stevens thereby rejected the majority's contention that the district court abused its discretion by ordering discovery.[223]

IV. REASON, NOT RHETORIC, SHOULD GUIDE DETERMINATIONS OF SELECTIVE PROSECUTION CLAIMS

The *Armstrong* mandate of an arduous threshold standard for discovery in selective prosecution claims can best be explained in light of the Court's concerns.[224] First, the Court showed apprehension toward the separation of powers between the executive and judicial branches;[225] and, secondly, the Court believed that the judiciary was not well equipped to review the constitutionally granted discretion of prosecutors.[226] The Court, therefore, established a stringent threshold of discovery in order to accommodate these articulated concerns.[227]

The Court premised its holding on the theory that selective prosecution entailed a deliberate selection of defendants for prosecution.[228] De-

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223. *See id.*

224. *Cf. id.* at 1486-87 (noting that separation of powers concerns surround the review of selective prosecution claims).

225. *See id.*

226. *See id.* at 1486 (stating that federal prosecutors have "broad discretion" to enforce the nation's criminal laws); Town of Newton v. Rumery, 480 U.S. 386, 396 (1987) (holding that prosecutors should be granted broad discretion because they, not the courts, must evaluate the strength of the case, the allocation of resources, and enforcement priorities); Wayte v. United States, 470 U.S. 598, 607 (1985) (confirming that the government retains the discretion to prosecute); United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982) (noting a prosecutor's discretion concerning which charges to bring); *see also* United States v. Palmer, 3 F.3d 300, 305 (9th Cir. 1993) (concluding that "separation of powers concerns prohibit us from reviewing a prosecutor's charging decisions absent a prima facie showing that it rested on an impermissible basis"); United States v. Chagra, 669 F.2d 241, 247 (5th Cir. 1982) (noting that the Constitution grants the executive branch the authority to execute laws). Prosecutors are granted this latitude because they must help the President "take Care that the Laws be faithfully executed." *Armstrong*, 116 S. Ct. at 1486 (quoting U.S. CONST. art. II, § 3); *see also supra* notes 39-41 and accompanying text (demonstrating judicial deference to a prosecutor's charging decisions). This court-granted discretion, however, has been criticized for its potentially harmful effects. *See* Vorenburg, *supra* note 41, at 1555 (arguing that unchecked prosecutorial discretion raises the possibility that unjustified criminal sanctions will be imposed more often on the unempowered members of society such as minorities and the poor); *see also supra* note 41 (describing some of the criticism of the judicial deference granted prosecutors).

227. *See Armstrong*, 116 S. Ct. at 1487. The rigorous standard of discovery and the elements of a selective prosecution claim serve to protect the government's charging decisions from incessant judicial scrutiny. *See id.* at 1488. The arduous discovery standard has limited the judicial scrutiny of the government's charging decisions because it lessened the likelihood of frivolous selective prosecution claims. *See id.*; *see also supra* note 47 and accompanying text (articulating the costs of frivolous selective prosecution claims).

228. *See Armstrong*, 116 S. Ct. at 1488.

fendants, therefore, should be required to present evidence of other similarly situated offenders in order to demonstrate deliberate selection.[229] Mere demonstration of a racial disparity in the effect of the government's enforcement of drug offenses does not demonstrate selection, but rather only that the government prosecuted one group of offenders for a particular crime more than another group.[230]

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229. *See id.* at 1489.

230. *See id.* The Court gave no weight to the respondents' assertion that selective prosecution had taken place because of racial disparities in the government's enforcement of federal crack offenses. *See id.* The Court viewed the Ninth Circuit's premise that "people of *all* races commit *all* types of crimes" as equally preposterous. *Id.* at 1488-89. The Court stated that, "[p]resumptions at war with presumably reliable statistics have no proper place in the analysis of [the] issue." *Id.* at 1489. Indeed, the Court referred to statistics confirming the notion that particular crimes can be associated with particular racial groups. *See id.* (citing 1994 U.S. SENTENCING COMM'N ANN. REP. 107). Those statistics demonstrated whites comprised 93.4% of those convicted for dealing LSD and 91% of those convicted for pornography or prostitution. *See* 1994 U.S. SENTENCING COMM'N ANN. REP. 107. Moreover, 90.4% of those persons sentenced for trafficking crack were black, 72.9% of those sentenced for trafficking methamphetamines were white, while only 1.6% were black. *See id.*

Evidence independent of the conviction rate for crack offenses also suggests that blacks use crack in greater proportion than whites. In 1994, for example, blacks were involved in "71.5% of emergency room admissions for crack-related problems." Drew S. Days III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 179, 188 (1996). Accordingly, during that same year, "blacks comprise[d] over 69% of the admissions for treatment for crack abuse, whereas whites comprised only 24%." *Id.*

The existence of a racial disparity in federal crack prosecutions is rather apparent. Blacks comprise 90% of all federal crack defendants, whereas whites, for example, comprise about 4%. *See* Days, *supra*, at 186. Racial disparities also exist in the arrest rate of black, as compared to white, offenders. *See* Richard Berk & Alec Campbell, *Preliminary Data on Race and Crack Charging Practices in Los Angeles*, 6 FED. SENTENCING REP. 36, 37-38 (1993) (noting that during a two-year period in Los Angeles, 58% of those arrested for selling crack were black, while the United States Attorney did not prosecute a single white for a crack related offense).

Moreover, a disparity exists between the percentage of blacks who use illicit drugs in a given year and those who are arrested for drug crimes. *See* MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 12 (1995). In the early 1990s, blacks comprised only 13% of monthly drug users, but comprised 35% of drug possession arrests, 55% of drug possession convictions, and 74% of drug possession imprisonments. *See id.* at 12; SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERV., NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: POPULATION ESTIMATES 1993, at 19 (1994) (reporting that approximately 12.1% of Americans who used illegal drugs in 1993 were black); F.B.I. UNIFORM CRIME REP. 235 (1994) (reporting that 38.4% of those arrested in 1994 for drug crimes were black).

Drew S. Days III, a former Solicitor General of the United States, posited three race-neutral reasons why a disparity existed between the drug use and arrest rate of black drug users. *See* Days, *supra*, at 187-88. First, the type of drug used could increase the risk of arrest. *See id.* at 1487. For example, marijuana users are four-to-nine times less likely to

As a result of *Armstrong*, selective prosecution claims will be harder for defendants to prove given the stringent discovery threshold that defendants must now overcome.[231] Yet defendants will not be advantaged for the simple reason that selective prosecution claims most often are an ineffectual gamble to defeat criminal charges, with the odds usually weighing heavily in the government's favor.[232] The *Armstrong* ruling merely ensures that defendants frequently will fail to demonstrate a successful selective prosecution claim just as defendants have failed consistently in the past.[233]

The *Armstrong* decision, with respect to the prima facie case for selective prosecution, is consistent with general equal protection analysis courts invoke to address a defendant's claim of racially motivated administration of a facially neutral law.[234] The *Armstrong* Court, however,

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be arrested than cocaine and heroin users. *See id.* Second, the frequency of drug use may increase the risk of arrest. *See id.* at 187-88. Additionally, the frequency of drug use of black drug users is greater than whites. *See id.* at 188. Thus, the percentage of black drug users in the black population is probably less than the frequent use of some black drug users suggests. *See id.* Finally, the geographic location of drug use may affect the arrest rates in that area. *See id.* The risk of arrest for drug users living in an urban area with a population more than one million people is more than twice as high as the risk for a user living in a rural county. *See id.* (stating that the black population is disproportionately concentrated in large metropolitan areas).

231. *Cf. Armstrong*, 116 S. Ct. at 1489 (stating that the majority of the federal circuits premise discovery for a selective prosecution claim upon a demonstration of similarly situated defendants of other races who were not prosecuted). In order to obtain discovery for selective prosecution defendants must now prove that others similarly situated could have been prosecuted but were not. *See id.*; *see also supra* note 182 and accompanying text (explaining the threshold of discovery for a selective prosecution claim).

232. *See* United States v. Bourgeois, 964 F.2d 935, 940 (9th Cir. 1992) (noting the rarity of successful selective prosecution cases resulting in discovery or the dismissal of charges); Creech, *supra* note 9, at 394 (noting that the Supreme Court has never overturned a criminal conviction based on selective prosecution); Romero, *supra* note 11, at 2053 (stating that defendants rarely raise successful selective prosecution claims). *But cf.* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (failing to use the words "selective prosecution" but reversing the convictions of Chinese laundry operators on the grounds that laundry regulations were enforced almost exclusively against persons of Chinese ancestry).

233. *See supra* note 232 (explaining the limited success of selective prosecution claims).

234. *See Armstrong*, 116 S. Ct. at 1487 (stating that the defendant "must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose'") (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)); *see also supra* note 9 (demonstrating the development of the two prongs of equal protection analysis). Commentators have criticized this equal protection standard. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987) (arguing that to require proof of discrimination through a demonstration of the government's unlawful motive is both unreasonable, given the onerous evidentiary hurdles such a requirement entails, and irrelevant in that discrimination exists regardless of motive); Todd Rakoff, Washington v. Davis *and the Objective Theory of Contracts*, 29 HARV. C.R.-C.L. L. REV. 63, 63 (1994) (purporting that the

providing that defendants were entitled to discovery only in situations where the defendant could demonstrate a showing of similarly situated defendants,[235] did not adequately consider the ramifications of the decision. Of the evidentiary problems that defendants face,[236] the Court back-handedly stated that "the similarly situated requirement does not make a selective-prosecution claim impossible" for a defendant "to prove."[237] To lend credibility to the claim that defendants have demonstrated successfully the similarly situated requirement in the past, the Court relied on *Yick Wo*, a successful selective prosecution case decided more than one hundred years ago.[238] The Court, however failed to give specific guidance on how defendants can achieve a successful demonstration of similarly situated defendants.[239] Accordingly, the *Armstrong*

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dual-pronged equal protection analysis "devalues important evidence, underrates significant voices, establishes less than optimal incentives, and wrongly converts matters of great institutional complexity into individualistic morality plays"); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1318-19 (1995) (suggesting that the government should be required to rebut the inference of conscious or unconscious racism in situations where a federal sentencing rule has a disproportionate impact on black defendants); Sheri Lynn Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1031 (1988) (criticizing the dual-pronged equal protection analysis given the difficulty in proving the discriminatory purpose prong); Pamela S. Karlan, Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 112 (1983) (arguing for a less stringent discriminatory intent threshold).

235. *See Armstrong*, 116 S. Ct. at 1488. The Court justified its "rigorous" standard for discovery in selective prosecution claims on the basis that the discovery costs imposed a hardship on the government. *See id.* Specifically, the government would be forced to root through its files to compile the requested documents. *See id.* Selective prosecution claims therefore divert the government's resources, normally expended on the prosecution of a defendant, in order to defend against a traditionally futile claim. *See id.* The government also risks exposing its prosecutorial strategy through compliance with discovery. *See id.*

The Court, however, did not explain how defendants should gain the necessary information for a selective prosecution claim without discovery of the government's materials. *Cf. id.* at 1489 (stating only that respondents could have researched whether similarly situated persons of other races could have been prosecuted in federal court, but were not). Yet, the Court did not note how these respondents were to accomplish the task. *See id.* (asserting only that the respondents could have demonstrated that persons of other races were being treated more favorably than the respondents).

236. *See* Wayte v. United States, 470 U.S. 598, 624 (1985) (Marshall, J., dissenting) (noting that most evidence of selective prosecution lies in the hands of the government).

237. *Armstrong*, 116 S. Ct. at 1487.

238. *See id.* Yick Wo successfully demonstrated a selective prosecution claim based on evidence that only persons of Chinese ancestry were subject to an ordinance making wooden laundry operations unlawful. *See* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886). Since 1886, however, the Supreme Court has never ruled in favor of a defendant's selective prosecution claim. *See* Creech, *supra* note 9, at 394; *see also supra* note 232 (explaining the limited success of selective prosecution claims at the federal level).

239. *See supra* note 235 (explaining the Court's curt analysis of the evidentiary problems defendants face in demonstrating the discovery threshold of a selective prosecution claim).

Court did not adequately define the phrase "similarly situated," thereby leaving its interpretation to the circuit courts.[240]

A defendant is placed in a precarious situation regarding the discovery of governmental materials given the necessity of demonstrating similarly situated offenders. To be entitled to discovery, a defendant must present evidence of similarly situated offenders who were treated differently.[241] Defendants usually will need the assistance of government materials in the first instance because evidence of selective prosecution typically lies in the hands of the government.[242] Thus, to obtain discovery of government materials to bolster the defendant's selective prosecution claim, a defendant first must present evidence of similarly situated offenders, which is also usually under government control. The selective prosecution defense, therefore, will remain, for most defendants, only an illusory opportunity to defeat criminal charges open to those with good fortune to discover the necessary "similarly situated" evidence.[243]

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240. *Cf. Armstrong*, 116 S. Ct. at 1487 (noting that *Yick Wo* contained a successful demonstration of the similarly situated requirement). The Court demonstrated the similarly situated requirement by way of analogy. *See id.* (noting the statistical disparity presented in *Yick Wo* regarding the administration of a facially neutral criminal ordinance which resulted in greater arrest rates of Chinese laundry operators as compared to white laundry operators). Following the *Armstrong* decision, the Fourth Circuit ruled on the requisite showing to demonstrate similarly situated defendants. *See* United States v. Olvis, 97 F.3d 739, 744 (4th. Cir. 1996). *Olvis* involved the indictment of two black defendants for a crack cocaine conspiracy. *See id.* at 741. The defendants argued that five unindicted white persons were similarly situated and that, since 1992, more than 90% of those indicted in the Norfolk-Newport News of Virginia area for crack offenses were black. *See id.* In rejecting the defendant's claim, the Fourth Circuit held "that defendants are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them." *Id.* at 744.

241. *See Armstrong*, 116 S. Ct. at 1489.

242. *See* Wayte v. United States, 470 U.S. 598, 624 (1985) (Marshall, J., dissenting) (stating that the majority of the relevant evidence of selective prosecution will be found in the government's possession); *see also* Romero, *supra* note 11, at 2049, 2067-68 (asserting that existing proof of selective prosecution usually is in the government's control). Some commentators have argued that only through discovery will defendants be provided with evidence that federal agents or prosecutors were aware of particular offenders yet declined to prosecute them. *See* Leading Cases, *Constitutional Law*, 110 HARV. L. REV. 135, 172 (1996). Prosecutors remain hesitant to cooperate voluntarily regarding a defendant's selective prosecution claim. *See* Brief of NAACP Legal Defense & Educa. Fund, Inc., and American Civil Liberties Union as Amici Curiae in Support of Respondents at 13 & n.19, United States v. Armstrong, 116 S. Ct. 1480 (1996) (No. 95-157) (discussing efforts of numerous state task forces to investigate racial inconsistencies in prosecutorial patterns). Some commentators have argued that prosecutorial cooperation is essential given that the relevant information is rarely available to the public. *See id.*

243. *See* Creech, *supra* note 9, at 415 (stating that the selective prosecution claim rarely defeats a criminal charge); Romero, *supra* note 11, at 2049 (stating that defendants

The *Armstrong* ruling can best be explained as a natural progression of the law. Equal protection standards always have guided the prima facie case for selective prosecution.[244] The Court in *Armstrong* did not deviate from that standard, in that a successful selective prosecution claim on the merits will include a demonstration of discriminatory effect and discriminatory purpose.[245] Accordingly, the threshold for discovery of a selective prosecution claim is justifiable in that a majority of the circuits require the same showing that *Armstrong* demands.[246]

Judicial respect for the duties of the executive branch also mandates the rigorous standard for the selective prosecution claim and for its discovery standard.[247] The judiciary continues to be wary of judicial activism and judicial review in situations involving the executive's exercise of its constitutionally mandated duties.[248] Thus, defendants are fighting a nearly impossible battle in the attempt to prove such claims because the courts will presume that the executive's agents act in good faith out of respect for the constitutional separation of the two branches.[249]

V. CONCLUSION

The Fifth Amendment and the Fourteenth Amendment Due Process Clauses protect defendants from arbitrary prosecution only upon an exacting demonstration of discriminatory effect and intent. In *Armstrong*, the Court affirmed the majority of the circuit courts of appeals in its analysis of the necessary threshold required for discovery in a selective prosecution claim. The goal of the Court was twofold: uniformity of the discovery threshold among the circuits, and continued respect for the constitutional concerns that accompany the claim of selective prosecution. Each goal should be achieved through an exacting standard for discovery and the merits of the claim. Although the Court effectively ar-

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rarely succeed on selective prosecution claims because the proof required to establish such claims is difficult to obtain).

244. *See supra* notes 96-100, 197-205 and accompanying text (explaining the prima facie case for a selective prosecution claim).

245. *See supra* notes 96-100, 197-205 and accompanying text (discussing both the discriminatory effect and purpose prongs of the prima facie case for selective prosecution).

246. *See supra* note 182 (explaining that the majority of the circuit courts require a showing of similarly situated defendants for a successful demonstration of the discovery threshold).

247. *See supra* note 226 (explaining the judicial deference to the government's exercise of its duty to enforce the nation's criminal laws).

248. *See supra* note 226 (emphasizing the judiciary's reluctance to interfere with the prosecutor's charging decisions).

249. *See supra* note 226 (emphasizing that separation of powers concerns prevent the judiciary from infringing on executive branch powers).

ticulated the necessary threshold for discovery, the Court did not venture an opinion as to how such evidence might be obtained to overcome the threshold. As a result, the Court's pronounced test for discovery may be so exacting as to moot the effectiveness of the selective prosecution claim itself.